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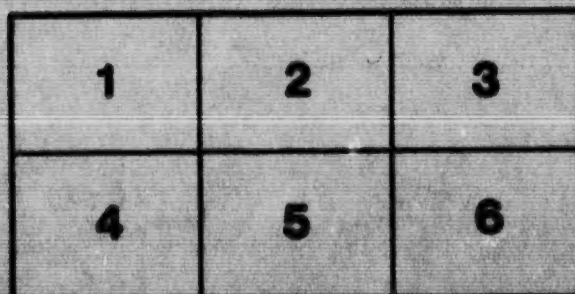
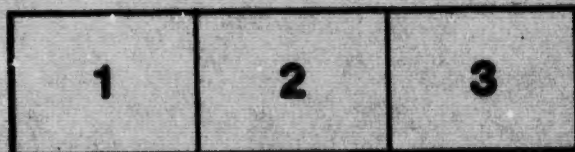
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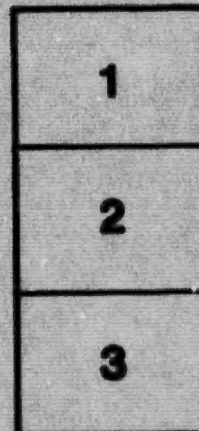
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THE
LAW OF INTERPLEADER.

THE
LAW OF INTERPLEADER

AS ADMINISTERED BY
THE ENGLISH, IRISH, AMERICAN, CANADIAN
AND AUSTRALIAN COURTS,

WITH AN
APPENDIX OF STATUTES.

BY
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TORONTO, CANADA.

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PREFACE.

The preface to a law book is the legal writer's opportunity, he can there stand aside and say what he thinks and feels about the subject of which he has been treating. Within he is treading on sacred ground where he is surrounded by precedent to which he must bow, and if here and there he finds a gap to be filled, or a remark is called for upon conflicting decisions, he must do what is necessary in a humble spirit. The comparative antiquity of interpleader and its continuous and increasing growth, make the author feel that he has been in the company of a living organism in the great and growing body of the law. Its development goes on, and every day he enters a law library he finds something new in the last digests or reports, and the question when to stop becomes a serious one. All this makes him convinced that no law book is perfect, for the legal growth continues, and new editions are necessary, not always because the last one is out of print, but, because it is not up-to-date. It is with this feeling that the author gives the result of his labour to the profession.

Several centuries ago in England, the double vexation of some individual in respect of a single liability, caused the jurists of that day to devise for the relief of future stakeholders a legal remedy which became known as "interpleader." This grew and flourished in the Courts of Law for a time, and then became obsolete. The Court of Chancery, also at an early period, assumed jurisdiction to provide a remedy and widened and fostered it, naming it interpleader, and wherever at any time equitable principles have

been applied in the administration of justice, bills or actions of interpleader may there be found. In 1831 an English Statute brought the proceeding again into vogue in the Courts of Law. In giving these Courts interpleader jurisdiction the Parliament of William IV. enacted, that in administering the remedy the Judges were to make such rules and orders as might appear to be just and reasonable, —very wide powers it may be observed. Since that date, this, the first of all Interpleader Acts, has been widely copied, with its just and reasonable or discretionary powers. It followed equitable interpleader over the Channel into Ireland, across the Atlantic to the United States, Canada, Newfoundland and the Bermudas, around the Cape to India, and on to Australia, New Zealand and the Hawaiian Islands, while something like it is found in Japan. In Scotland as early as the fourteenth century a corresponding proceeding was in use. It is known in Scots law as *multiplepoinding*; and in the course of time has there acquired in some respects a wider scope than interpleader, although it has a smaller and simpler body of law about it.

From the English speaking Judges of the world has come an increasing number of reported decisions upon this branch of the law, while nearly sixty Legislatures have enacted statutes, all based upon the English Act of 1831. In the study of these the author has spared neither time nor pains, and it has been his ambition to give his subject form and completeness, by working all the material into a book, which he hopes may be of some use in all Courts where English speaking Judges preside.

In a sense interpleader is but a small part of the law, which as a study in comparative jurisprudence has hitherto not received attention from legal writers, with the exception of two or three small handbooks covering English cases only, and a Pennsylvania work of fifty pages dealing with sheriff's interpleader. It is a branch of the law lying across that varying line, which connects rather than separates principles from pleading and practice. Works on equity cover only leading principles, and works on practice the

authorities of but one or two jurisdictions. Though small, the subject has its own use and a growing importance. The proceeding has been referred to by the Courts as "summary," "convenient," "beneficial," "beneficent," "one of the most valuable forms of judicial procedure known, and so important that its application will not be unnecessarily limited."

The author in endeavouring to make the scope of the remedy better known, commits his book, imperfect though it be, to the profession, with the hope that it may be useful to the practitioner, and may perhaps lead to some improvement in the law. The lack of a work on the subject has at times been the cause of unnecessary judicial labour, as some judges have considered it necessary to write a short treatise in dealing with simple questions, and in some instances decisions have been given without regard to established rules, and without reference to leading cases. While the general principles are the same in most jurisdictions, certain sides of the subject have been developed more in one country than in others. A large citation of the authorities seems necessary to exhibit the remedy in all its features, as well as to suggest the general adoption of improvements already in use in some systems, but unknown in others.

A considerable familiarity with the remedy, coupled with the fact that the Province of Ontario has more reported decisions on the subject, in proportion to population, than are to be found in any other jurisdiction, must be my excuse for having attempted to produce the first comprehensive treatise on the law of interpleader.

R. J. M.

Toronto, Canada.
1901.

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THE LAW OF INTERPLEADER.

CHAPTER I.

INTRODUCTORY.

Interpleader defined.—Interpleader is a legal proceeding devised to enable a person of whom the same debt, duty or thing, is claimed adversely by two or more parties, to compel them to litigate the right or title between themselves, and thereby to relieve him from the suits which have been or otherwise might be brought against him. Literally the term means, to discuss or try a point incidentally happening as it were between, before the principal cause can be determined.¹

The need for the remedy.—Instances are continually occurring in a commercial community when, from peculiar and unforeseen circumstances a person who owes a debt, or has incurred a liability, or is in possession of property, is unable to determine without serious risk, to which of several adverse claimants it should be rendered. To prevent the probable, or even possible injustice or vexation, arising from the prosecution of actions by any or all of such claimants, the court will compel them to test their claims by judicial investigation in an action or issue between themselves—in other words the court will compel them to interplead—on the application of the party owing the debt or liability or in possession of the property, and will relieve him from further responsibility. It matters not in what capacity the applicant for relief has incurred

¹ *Jac. l. 1* Dict. (1732).

the liability, whether as a stakeholder, tenant, agent, a public officer such as a sheriff, or as an accidental recipient of property. He has a right, upon showing himself within the rules which govern interpleader, to claim the equitable intervention of the court for his complete indemnification and relief.³ It has been said that the mere statement of the principle shows its justice.⁴

The ground of the relief.—The right to the remedy by interpleader is founded, not on the consideration that a man may be subjected to double liability, but on the fact that he is threatened with double vexation in respect of one liability.⁵ The ground of the relief is not, that a person may not be able with great attention and caution to make himself secure, but that he may secure himself by one suit instead of several, as one payment ought to discharge him.⁶ It would be a disgrace to the administration of justice, if the law should levy a sum of money from a defendant for one person, and the same law should, without any default of the defendant, compel him to pay the same debt to another.⁷

The object in interpleader.—The supreme object of an interpleader proceeding is to protect a person when he stands in the situation of a stakeholder not knowing to whom to pay the money or to deliver the property, so that he shall not be vexed by contending claimants, whose contention is not in reality with him but with each other, when a recovery against him by one party will not be a protection against the claim of the other.⁸

The remedy has limitations.—The ordinary interpleader, whether in equity or under a statute, is not extensive

³ *Beck v. Stephani* (1854), 9 How. N. Y. 188.

⁴ *Evans v. Wright* (1865), 13 W. R. 468.

⁵ *Crawford v. Fisher* (1842), 1 Hare 436; *Pfister v. Wade* (1880), 56 Cal. 43; *National v. Platte* (1894), 54 Ill. App. 483; *Fairbanks v. Belknap* (1888), 135 Mass. 179.

⁶ *Angell v. Hadden* (1806), 15 Ves. Jun. 247.

⁷ *Coates v. Roberts* (1833), 4 Raw. Pa. 100.

⁸ *Badeau v. Rogers* (1890), 2 Pal. N. Y. 209; *Hastings v. Cropper* (1867), 3 Del. Ch. 165; *Newhall v. Kastens* (1873), 70 Ill. 156; *New York v. Haws* (1873), 35 N. Y. Sup. Ct. 372; *Livingstone v. Bank of Montreal* (1893), 50 Ill. App. 562; *Hartford v. Cummings* (1897), 59 Neb. 286.

enough to cover every case where there are two claimants and the stakeholder has no interest;⁹ when there are adverse claimants, and a bailee cannot compel them to interplead, he must defend himself as well as he may.¹⁰ The remedy does not always work complete justice, but it does so as far as possible, it settles the matter between the two claimants, and it stops other litigation.¹¹

The result of the remedy.—The peculiarity of an interpleader suit is, that the moment a decree is awarded the plaintiff has done with it, and though not out of court his suit remains as the groundwork to give effect to further proceedings, yet, having nothing to ask or give, the court if he dies will not require a bill of revivor to be filed. The defendants remain actors, but the plaintiff becomes a nonentity except in respect of his costs.¹² The result therefore, when the remedy is awarded, is, that the applicant disappears from the proceedings, while the conflicting claimants litigate the matter among themselves, without further involving the stakeholder in a controversy with which he has really no interest, and as to which he can no longer be heard. The applicant's position has been described as that of a person, who merely stirs up a war, and then leaves the real belligerents to fight it out, he retiring from the scene to repose in dignified ease, holding the while the prize which is to reward the victor.¹³

The court favours the applicant.—The courts are generally very liberal in favouring and protecting persons standing in the situation of stakeholders, having no interest in the property claimed, and only desiring honestly to pay it where it is justly due.¹⁴ The remedy is so beneficial that, any doubts as to the right to maintain it will be resolved

⁹ *Lindsay v. Barron* (1848), 6 C. B. 291.

¹⁰ *Powell v. Robinson* (1884), 76 Ala. 423; *Bateman v. Farnsworth* (1860), 29 L. J. Ex. 385.

¹¹ *Laing v. Zeden* (1874), 9 L. R. Ch. 736.

¹² *Jennings v. Nugent* (1828), 1 Moll. 134.

¹³ *Andrews v. Halliday* (1879), 63 Ga. 263; *Smith v. Emigrant Bank* (1888), 17 N. Y. St. Rep. 852; *Owings v. Rhodes* (1886), 65 Md. 408; *Willison v. Salmon* (1889), 45 N. J. Eq. 257.

¹⁴ *Westervelt v. Ackerman* (1835), 2 Green N. J. 325; *School District v. Weston* (1875), 31 Mich. 86.

in favour of the applicant.¹⁴ As to interpleader statutes it has been said that, as they provide an inexpensive and speedy mode for the litigation and settlement of controversies, of the nature under discussion, the remedy should not be so restricted or clogged by technical qualifications, as to deprive it of any of the advantages intended to be secured under a just and liberal construction and application.¹⁵ In England it has been stated that, the authorities, the history of the law, and the modifications which have taken place in interpleader show, that eminent judges have been of opinion that the scheme of legislation has been to remove the restrictions which formerly existed, and to give a wider jurisdiction to the courts;¹⁶ and as to sheriff's interpleader that the courts are now disposed to be more liberal than when the Act was first enacted.¹⁷

Relief is discretionary.—The English Interpleader Act of 1831, and most interpleader codes which have been founded upon it, are not compulsory, but authorize the interposition of the court at its discretion upon proper occasion, and upon such terms as may be just. The duty of the court is to see that the party applying for the exercise of the discretion has not voluntarily put himself in the situation from which he calls upon the court to extricate him.¹⁸ Nor is it imperative on the court to grant an issue, when applied for by a sheriff, it is not a matter of right but of sound discretion under all the circumstances.¹⁹ In Ireland it has been held that the court is not to be coerced into granting an issue.²⁰

Interpleader not imperative.—When a defendant has obtained an interpleader order, that a third party claim-

¹⁴ *Supreme v. Merrick* (1895), 103 Mass. 374.

¹⁵ *Barnes v. New York* (1882), 27 Hun. N. Y. 236.

¹⁶ *Ex p. Mersey Docks, etc.* (1889), 1 Q. B. 546.

¹⁷ *Holt v. Frost* (1858), 3 H. & N. 546; *Darling v. Collatton* (1883), 10 Ont. Pr. 110; *Macdonald v. Great North-West* (1894), 10 Man. 83.

¹⁸ *Belcher v. Smith* (1882), 9 Bing. 82; *Barry v. Mutual Life* (1878), 53 N. Y. 536; *Burritt v. Press Pub. Coy.* (1898), 25 App. Div. N. Y. 141; *Sifford v. Beatty* (1861), 12 Ohio St. 189.

¹⁹ *Bain v. Funk* (1869), 61 Pa. St. 185.

²⁰ *Deehan v. Lynch*, 2 Ir. Jur. G. S. 15.

ing be substituted as defendant upon the original defendant paying the fund into court, it is not imperative and the defendant need not take advantage of the favour granted to him, but may go on and defend the suit;²¹ nor can a claimant oblige a stakeholder to take the benefit of the remedy.²² A statute which allows a defendant to interplead, is not intended to defeat the common law right of a defendant, to set up an outstanding superior title to the plaintiff, with which he connects himself. If a defendant fail to interplead, his liability to his bailor, remains as it was without the statute.²³

Litigations involved.—An interpleader always involves two litigations. First the proceeding in which the applicant claims the right to be relieved from his difficulty, and this may be, either an original proceeding commenced by him, or it may arise out of an action already commenced by one of the claimants. Secondly, the contest which is directed between the claimants. The subject of these litigations are wholly separate and distinct, they require separate allegations and separate proofs. It follows, therefore, that if the applicant be entitled to an interpleader the court will never retain him in the litigation, or proceed in his presence to determine the rights of the adverse claimants.²⁴

Origin of the remedy.—The remedy has an Anglo-Saxon origin. Courts of Law in England from a very early date, awarded within a narrow range relief by way of 'enterpleader,' as it was then termed. The practice and principles of interpleader seem to have been adopted by the court of Chancery in England, at a date subsequent to their origin in courts of law. The court of Chancery followed to some extent the analogies of the law, but extended the relief to a much wider range of cases. Although the procedure at common law afterwards became obsolete, the fun-

²¹ Neill v. Wuest (1861), 17 Abb. N. Y. 319.

²² Harrison v. Forster (1886), 4 Dowl. 558.

²³ Behr v. Gerson (1891), 85 Ala. 438.

²⁴ Perkins v. Trippe (1869), 40 Ga. 225; Owings v. Rhodes (1866), 65 Md. 406; Roselle v. Bank (1896), 110 Mo. 84.

damental principles on which it was founded continue to be applied in courts of equity, and are the basis of the interpleader statutes which have since been enacted in various countries. Reference will therefore be made to interpleader, first in courts of law, second in courts of equity, and third under interpleader statutes.

In courts of law before 1831.—Interpleader at law in English courts was awarded where there was a joint bailment by both claimants, or where a chattel had come to a man's possession by accident, and in a few other special cases.²⁵ The subject in its narrow range at law was greatly elaborated and abounded with technical terms and pleadings.²⁶

The practice of depositing deeds and other chattels, in the hands of a third person, to await the doing of some act upon which they were to be redelivered to one or other of the parties, gave occasion to many actions of detinue, against the depositary, whenever the crises happened for their being demandable.

If one action of detinue were brought for such deeds or chattels the defendant might plead for his protection that they were delivered to him by the plaintiff and a third party upon certain conditions, and that he did not know whether the conditions were performed, wherefore he prayed 'garnishment,' as it was called, that the third party might be summoned to show whether they had been performed; thereupon a *scire facias* issued against the third party, who, under the name of garnishee became defendant to the suit in the place of the first defendant, the latter being then considered out of court, as he either brought the subject matter into court, or held it to deliver to the person entitled.²⁷

If two actions were brought for the deed, one by each of the parties who concurred in the bailment, the recourse

²⁵ See for this and the following paragraphs Reeve's History of the English Law, Finlason's Edit., Vol. 2, p. 635 *et seq.* Russell v. Church (1870), 65 Pa. St. 9; Bridge v. Martin, 3 West. Law Monthly (Ohio) 20.

²⁶ Viner's Ab. (1753), Vol. 9, pages 419-440.

²⁷ Rich v. Aldred (1704), 6 Mod. 216.

of the defendant was in praying that the two plaintiffs might interplead. The plaintiff whose suit was of the prior date was made plaintiff, if they were of the same date the plaintiff was he who first came and demanded an answer, or the court as it pleased might assign either to be plaintiff.

The reason for the relief, was that a mere depositary of a deed, which he held as trustee for two persons, should not be harrassed by both, but should be allowed to call on the court to award that they contest the right to the deed between themselves.

If the depositary might be liable to both parties, he could not have the privilege, but was left to defend both actions as best he could. It was said that if he chose to charge himself with several bailments, it was his own folly and he must abide by it. If two actions were brought for title deeds, one by the heir who was entitled to the land, and one by a bailor upon a bailment to re-deliver to him, interpleader would not lie because the defendant was liable to both plaintiffs.

There must have been privity between the two parties claiming the thing in question, or the defendant could not have garnishment if sued by one only, or interpleader if sued by both. The defendant must always have alleged privity in the bailment, although sometimes privity in the detinue was held sufficient.

If the chattel had come to the possession of the defendant by finding, it was the practice to allow him to interplead, although there was no joint bailment, and might be no privity between the claims.

In some cases, notwithstanding the rules as to privity and double liability, the courts were inclined to award an interpleader to prevent a multiplicity of suits. It was argued that both plaintiffs could not be entitled to the same deeds, and that although one plaintiff might recover them, the other plaintiff would still have his action for them, which circuitry would be avoided by an interpleader. So, if the defendant pleaded that the two plaintiffs joined

in the bailment, and denied a several bailment as alleged by them, the court would not go behind his allegations, but would suffer the defendant to have an interpleader.

If a defendant prayed garnishment, and afterwards the garnishee brought an action of detinue against him, interpleader would not lie on the motion that the defendant was out of court by the garnishment. The opposite was also held.

If the two actions were brought in different counties, it was held at one time, that the defendant might have interpleader, and on another occasion that he might not; there was also the same uncertainty if the bailments were alleged in different counties. Afterwards it was agreed that the defendant might have relief, upon the idea that the detinue, and not the bailment, was the point of the action.

Interpleader was allowed in some few other actions besides that of detinue. When two writs of *quare impedit* were brought for the same avoidance: as where two patrons each offered to a bishop, a different person for the same vacant ecclesiastical office, the bishop might be relieved by an interpleader. So, where two guardians each claimed an infant's person, the person in possession might be awarded an interpleader, but not if he had taken the ward away from his guardian. And lastly if a person were found by office to be an heir of a tenant of the king in one county, and another were found such in another county, it was the practice that interpleader be awarded before either had livery, that is possession of the lands on becoming of age.

From this description of the process of interpleader at common law it is obvious that in its narrow range, it afforded no relief in a great variety of cases. Finally, when the action of trover, in which interpleader did not lie at law, took the place of detinue, this process became of little practical advantage in the years preceding 1831, when the first interpleader statute was enacted.

In 1831, it was said in England by the Lord Chancellor of that date 'a much more convenient mode of dealing with

conflicting claims has succeeded to interpleader at law, namely, that by which the stakeholder says to the claimant whose title he considers the best, take the goods but give me an indemnity. Although the stakeholder lends his name to the action, the real defendant is the person who has given the indemnity. This arrangement produces the whole effect of an interpleader at law, or in equity, and the action is tried once for all, and although the nominal parties are the stakeholder and one of the claimants, the real parties are the two conflicting claimants. This course has put an end to interpleader at law, and what now remains is only to be found in the court of Chancery.²⁸

In Upper Canada before the court of Chancery was established in 1837, it was said that there was no means whatever, by which relief could be had, other than the formal proceedings by garnishment or interpleader at law.²⁹

In Pennsylvania it was enacted in 1836 that the court of Common Pleas should have the power and jurisdiction of Courts of Chancery with regard to persons requiring relief by way of interpleader.³⁰

In Courts of Chancery.—The court of Chancery in England at an early date assumed concurrent jurisdiction with courts of common law in administering relief by way of interpleader. The narrow range within which the legal remedy was awarded, rendered it quite inadequate at law, and finally it seems to have disappeared. Courts of equity therefore, following to some extent the analogies of the law, extended this remedy to a much wider range of cases, and have continued so to do. It was said that in looking at the rules of interpleader at law, you discovered the principles which govern the court of Chancery.³¹

The principles of interpleader as followed in the court of Chancery in England were early carried across the Atlantic, and have ever since been consistently followed in all

²⁸ *Pearson v. Cardon* (1831), 2 Russ. & M., p. 613.

²⁹ 1 Upper Canada Jurist, 83.

³⁰ Pa. P. L. (1836) 789, sec. 13.

³¹ *Pearson v. Cardon* (1831), 2 Russ. & M. 613.

the courts of all the various States and Territories of the American Union, in which equitable relief is administered.

Principles of interpleader in equity.—The essential principles of interpleader in equity, may be summarized in a paragraph as follows: The jurisdiction of courts of equity to grant relief by interpleader is properly applied to cases where two or more persons, in some manner of privity, severally claim the same debt, duty or property, under different titles or in separate interests, from another person, who not claiming any title or interest therein himself, and not having incurred any independent liability to either of the claimants, and not knowing to which of them he ought of right to render the debt or duty claimed, or to deliver the property in his custody, and being unwilling to take the risk of deciding between the claimants, is either molested by an action or actions brought against him, or fears that he may suffer injury from the conflicting claims of the parties. The protection of the court is therefore sought on the most obvious equity, that the claimants should be put to litigate and settle the contest between themselves without involving the applicant in a dispute, in which he is not interested to any greater extent than as a mere stakeholder, and to prevent him from being compelled to pay or deliver the thing claimed to both the claimants, as well as from the vexation attending upon the suits which are or possibly may be instituted against him. The court must be invoked promptly before any judgment against the applicant has been recovered, and, as he is seeking a favour in asking protection the court will not permit the proceedings to be used collusively to give an advantage to either claimant, nor will it permit the applicant to delay the payment of money due from him by suggesting a doubt to whom it is due, therefore the applicant must annex an affidavit to his proceedings that there is no collusion between him and any of the parties, and if any money is due from him he must bring it into court, or at least offer to do so. Under these circumstances the court will take such action as will protect the stakeholder without delay,

leaving the parties disputing to litigate between themselves as to their rights.³²

Four conditions.—From this description of equitable interpleader it will be seen that four conditions must ordinarily exist before the remedy will lie:—(1) the same thing, debt or duty must be claimed by both or all of the parties against whom the relief is demanded; (2) all the adverse titles or claims must be dependent or derived from a common source; (3) the person seeking relief must not have, nor claim any interest in the subject matter; and, (4) he must have incurred no independent liability to either of the claimants, that is, he must stand perfectly indifferent between them in the position merely of a stakeholder.³³

³² *Langston v. Boylston* (1793), 2 Ves. Jun. 191; *Dungey v. Angove* (1794), 2 Ves. Jun. 304; *Angell v. Hadden* (1808), 15 Ves. Jun. 244; *Morgan v. Marsack* (1816), 2 Mer. 107; *Crawshay v. Thornton* (1837), 2 Myl. & Cr. 1; *Glyn v. Duesbury* (1840), 11 Sim. 139; *Crawford v. Fisher* (1842), 1 Hare 436; *Jones v. Thomas* (1854), 4 Myl. & Cr. 186; *Nelson v. Barter* (1864), 2 H. & M. 334; *Killian v. Ebbinghaus* (1883), 110 U. S. 563; *Hayes v. Johnston* (1842), 4 Ala. 267; *Gibson v. Goldthwaite* (1845), 7 Ala. 281; *Temple v. Lawson* (1857), 19 Ark. 148; *South Western v. Benson* (1896), 63 Ark. 283; *Pfister v. Wade* (1890), 56 Cal. 43; *Richardson v. Belt* (1898), 13 App. Cas. D. C. 197; *Strange v. Bell* (1852), 11 Ga. 103; *Adams v. Dixon* (1856), 19 Ga. 513; *Burton v. Black* (1861), 32 Ga. 53; *Perkins v. Trippe* (1869), 40 Ga. 225; *Schneider v. Seibert* (1869), 50 Ill. 284; *Newhall v. Kastens* (1893), 70 Ill. 156; *Cogswell v. Armstrong* (1875), 77 Ill. 139; *Morrill v. Manhattan* (1898), 82 Ill. App. 410; *Moore v. Partlow* (1899), 84 Ill. App. 361; *Louisiana v. Clark* (1883), 16 Fed. R. Lou. 20; *Lambert v. Penn Mutual* (1898), 50 Ia. Ann. 1027; *National v. Lanahan* (1883), 60 Md. 477; *Cobb v. Rice* (1881), 130 Mass. 231; *Fairbanks v. Belknap* (1883), 135 Mass. 179; *Michigan v. White* (1880), 44 Mich. 25; *Yarborough v. Thompson* (1844), 8 S. & M. (Miss.) 291; *Browning v. Walkins* (1848), 10 S. & M. (Miss.) 482; *Brown v. Bacon* (1854), 27 Miss. 589; *Hyman v. Cameron* (1872), 46 Miss. 725; *Snodgrass v. Butler* (1876), 54 Miss. 45; *Kring v. Green* (1846), 10 Mo. 195; *Orr v. Larcombe* (1879), 14 Nev. 53; *Farley v. Blood* (1854), 30 N. H. 354; *Mount Holly v. Ferree* (1864), 17 N. J. Eq. 117; *Leddel v. Starr* (1869), 20 N. J. Eq. 274; *Mcwhirter v. Halsted* (1885), 24 Fed. R. N. J. 828; *Atkinson v. Manks* (1823), 1 Cowen N. Y. 691; *Mohawk v. Clute* (1834), 4 Paige N. Y. 384; *Beck v. Stephani* (1854), 9 How. N. Y. 193; *Crane v. McDonald* (1890), 118 N. Y. 648; *North Pacific v. Lang* (1895), 42 Pac. Rep. 799 (Oregon); *Wallace v. Clingen* (1849), 9 Pa. St. 51; *Philadelphia v. Clarke* (1881), 15 Phila. Pa. 289; *Moore's Petition*, 7 Kulp. Pa. 97; *Zachray v. Gregory* (1870), 32 Texas 452; *Chesapeake v. Paine* (1877), 29 Gratt. Va. 502.

³³ *Wells v. Miner* (1885), 25 Fed. Rep. 533 (Cal.); *Commercial v. Newman* (1894), 55 Ill. App. 534.

Tendency to extend the remedy.—It will be found that these four conditions have been consistently required in all courts where interpleader, founded upon equitable principles, is awarded. Frequently, however, the courts have construed them as liberally as possible in favour of the applicant. Under many interpleader Acts and Codes, and in decisions upon them, it will be found, that these conditions have been considerably broadened in favour of persons seeking relief. Condition 2 has by some statutes been dispensed with, following the English Act of 1860, which provides that the titles need not have a common origin, but may be adverse to and independent of one another. Condition 3 has been enlarged, so that interpleader will be allowed although the applicant has an interest for costs or charges, as in the case of a warehouseman charging for storage. Condition 4 has been modified, so that an issue will be directed between the claimants to decide the title to the subject matter, while any claim outside that of title will be preserved to the party asserting it.

No interpleader when another remedy exists.—When the plaintiff has a complete protection at law, a bill of interpleader will not lie, it lies only when he can be protected in no other way, from an unjust litigation in which he has no interest, or where the legal remedy is inadequate.³⁴ Thus, where the applicant and claimants are all parties in the same suit, previously instituted, in which all the rights can be determined, interpleader will not lie.³⁵ But, when one claimant sues both the stakeholder and the other claimant, the defendant stakeholder will be allowed to pay the fund into court and to withdraw from the action,

³⁴ *Bedell v. Hoffman* (1830), 2 Pal. N. Y. 199; *Bleeker v. Graham* (1836), 2 Ed. Ch. N. Y. 647; *Dry Dock v. Carr* (1847), 2 Barb. N. Y. 60; *Hathaway v. Foy* (1867), 40 Mo. 540; *Oil Run v. Gale* (1873), 6 W. Va. 525; *New York v. Haws* (1873), 35 N. Y. Sup. Ct. 372; *Bird v. Fak* (1861), 2 Pinn. Wis. 69; *McDonald v. Allen* (1875), 37 Wis. 108; *Long v. Barker* (1877), 85 Ill. 431; *Fitts v. Shaw* (1900), 46 Atl. 42 (R. I.); *Henry v. Glass* (1865), 2 Man. 97.

³⁵ *Lloyd v. Tench* (1750), 2 Ves. Sen. 213; *Sleeking v. Behrens* (1837), 2 M. & C. 581; *Badeau v. Rogers* (1830), 2 Pal. N. Y. 209; *Williams v. Wright* (1857), 20 Tex. 499; *Evans v. Matlack* (1871), 8 Phila. Pa. 271.

while the plaintiff and the other defendant will be directed to litigate their rights by themselves.²⁶

Sometimes the court, while holding that a bill is not proper as a bill of interpleader, will retain all the parties in the litigation and endeavour to work out full and complete justice between them.²⁷

If the applicant has notice that the claimants propose to litigate the matter between themselves, his application for an interpleader will be refused.²⁸

Origin of first interpleader statute.—The first, of all interpleader statutes, was enacted in 1831 by the British Parliament.²⁹ It seems to have had its immediate origin through the report of a royal commission appointed in 1829, to enquire into the practice and proceedings of the English courts of common law. In introducing their report the commissioners said:—‘We shall submit the expediency of investing courts of common law with several new powers of a summary or equitable character, calculated to economize both time and expense, and prevent unnecessary resort to the aid of courts of equity.’ The report deals with several subjects, and has the following with regard to interpleader.³⁰

‘By the common law, if two persons deposited deeds with a third, to be redelivered according to the terms of an agreement, and one of them brought an action of detinue against the depositary, the latter by a process called garnishment, which is in effect a notice, might compel the other depositor to appear and become defendant in the action in his stead; and if a person were sued in separate actions of detinue by two depositors upon such a deposit, or by any two persons claiming to be the owners of goods

²⁶ *Ætna v. United States* (1885), 25 Fed. Rep. 531 (N. Y.); *Lane v. New York Life* (1890), 56 Hun. N. Y. 92.

²⁷ *Hollister v. Lefevre* (1868), 35 Conn. 461; *Blair v. Porter* (1861), 13 N. J. Eq. 267; *Hatfield v. McWhorter* (1869), 40 Ga. 269; see also *Slowman v. Back* (1832), 3 B. & Ald. 103; and New York Code, sec. 820.

²⁸ *Diplock v. Hammond* (1853), 23 L. J. Ch. 550.

²⁹ 1 & 2, William IV. (1831), c. 53.

³⁰ Commissioners' 2nd Report (20th Feby., 1830), p. 24.

which he had found he might allege the deposit or finding, on the record, and compel them to interplead. But as the proceedings by garnishment and interpleader were not allowed in any personal action, except that of detinue, a form which has of late fallen much into disuse, no practical advantage has been derived from them in modern times. The only course now resorted to for the relief of a person sued or in danger of being sued by several claimants, is that of filing a bill to compel the parties by the authority of a court of equity to interplead at law. Thus a distinct suit is instituted in a court which has no cognizance of the legal remedy of the parties, for the purpose of obtaining an order with reference to proceedings at law.⁴¹

The report then recommended a new summary proceeding, and suggested what in substance is the enactment which became law in England on the 20th October, 1831, and which appears in the statute book of 1 & 2 William IV. as chapter 58.⁴²

England and Ireland.—The English Act of 1831 allowed relief, only to a person who had been sued by one of the claimants, and to sheriffs and like officers. In 1860 the Common Law Procedure Act made several important changes in the principles and procedure, the most important being that the titles of the claimants need no longer be connected.⁴³ When the English Judicature Practice was codified in 1873, a rule was framed which made the procedure and practice of interpleader used by courts of common law under the Acts of 1831 and 1860 applicable to all the courts.⁴⁴ As this remedy could only be used by defendants, it was provided in the Judicature Act itself, that if a debtor, trustee, or other person liable in respect of a debt or chose in action had notice that an assignment thereof in writing was disputed by the assignor, or any one claiming under him, or of any opposing and conflicting claims to such debt or chose in action, he might call upon

⁴¹ Commissioners' Second Report, p. 76; for Act see Appendix.

⁴² 23 & 24 Vict. (1860) c. 126.

⁴³ Order I., Rule 2 of 1875.

the several claimants to interplead.⁴⁴ In 1883 the rule of 1875 was repealed, and a new code embodying in substance all the previous Acts was adopted, except that it followed the Chancery practice and allowed relief whether the applicant had been sued or not.⁴⁵ Although this Code is wide enough to cover all cases proper for interpleader, the section of the Judicature Act in relief of debtors and trustees is still retained.

The English Interpleader Act was adopted in Ireland in 1846, and the present English code in 1891.

In the United States.—In the United States, provisions founded on the English Act of 1831 were soon adopted; in Pennsylvania in 1836; and in New York in 1851. The following other States and Territories have also provisions for interpleader in their statute books: Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaiian Islands, Idaho, Indiana, Indian Territory, Iowa, Kansas, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. None of the provisions in the United States are as comprehensive as the present English Rules, but all of them are based upon the present English Act.⁴⁶

In Canada.—In Canada interpleader statutes providing for the relief of stakeholders and sheriffs, founded on the English Act of 1831, are in force, in Nova Scotia, New Brunswick, Prince Edward Island, Ontario, Manitoba, the North-West Territories and British Columbia. Quebec is the only exception. Newfoundland has also a similar statute. Ontario has been more enterprising than any other section of the world, in enacting interpleader provisions; the English Act was copied in 1843, when Ontario was part of the Province of Canada, and in seventeen different years

⁴⁴ 36 & 37 Viet. c. 66, s. 25 (6).

⁴⁵ Order LVII. of the Rules of 1883.

⁴⁶ See Appendix.

since, additions or amendments or consolidations have been placed upon the statute books.⁴⁷

Australian colonies.—In Australia interpleader statutes are in force in Victoria, New South Wales, Queensland, and also in New Zealand, all founded on the English Act of 1831.

Other jurisdictions.—The English statute has also been adopted in India, and in the Bermuda Islands, while a somewhat similar provision is found in the Code of Japan.

How statute first regarded.—When the Interpleader Act was adopted in England, it was at first looked upon as a substitute for the mode of obtaining relief by a bill in equity.⁴⁸ In considering whether or not interpleader should be granted, the courts of law were guided by the principles and practice which governed in the court of Chancery upon a bill of interpleader.⁴⁹

The Interpleader Codes adopted in the United States are also regarded in the same way. Thus it has been said in New York State that the Code provision is only intended to extend the powers formerly possessed by courts of equity to the legal actions designated by the Code, and its application has been confined to the class of cases in which a bill of interpleader would have accomplished the same end.⁵⁰ The design of the Code is not to introduce new cases, but merely to provide a summary proceeding when interpleader is proper.⁵¹

The right of a defendant under the New York Code to compel rival claimants to be brought into an action by motion, depends upon the same principles as the right

⁴⁷ See Appendix.

⁴⁸ *Frost v. Heywood* (1843), 2 Dowl. N. S. 801; *Slaney v. Sidney* (1845), 14 M. & W. 800.

⁴⁹ *Patoni v. Campbell* (1843), 12 M. & W. 277; *Lindsay v. Barron* (1848), 6 C. B. 291; *Lazarus v. Harris* (1888), 9 New South Wales 1 and 8.

⁵⁰ *Hornby v. Gordon* (1862), 9 Bosw. N. Y. 656; *Pustet v. Flannelly* (1880), 60 How. N. Y. 67; *Howe v. Gifford* (1873), 66 Barb. N. Y. 597; *Windecker v. Mutual Life* (1896), 12 App. Div. N. Y. 73; *Kellogg v. Freeman* (1874), 50 Miss. 127; *Dodds v. Gregory* (1883), 61 Miss. 351; *Coleman v. Chambers* (1900), 29 So. R. 58 (Ala.).

⁵¹ *Delancy v. Murphy* (1881), 24 Hun. N. Y. 508.

to maintain a bill or action of interpleader;⁵³ the principles which govern both are alike;⁵⁴ and when neither the Code itself, nor a decision under it, prescribe a rule, that which governs a bill of interpleader affords the guide in the statutory proceeding.⁵⁴

Later view in England.—In England, the rule of not making an order, unless the court of Chancery would under the like circumstances have admitted an interpleader bill, was by degrees departed from. It was said that courts of law should not be fettered by the rules of equity, when the Interpleader Act gave jurisdiction to do what was just and reasonable. The result was, that courts of law took a wider and more liberal jurisdiction in interpleader and gave relief, although the applicant had come under personal liability to one of the claimants, independently of the question of property. In 1860 the jurisdiction, as already pointed out, was further widened by statute, which allows the claims to be adverse and independent.⁵⁵

Statute does not oust equitable remedy.—Where courts of Chancery have existed separate and distinct from courts of law, the existence of an interpleader statute governing the proceeding in courts of law, has been held not to oust or take away the concurrent jurisdiction of the court of Chancery. A court of equity if first resorted to would not refuse to entertain a bill of interpleader, although a court of law might have been resorted to on the facts stated.⁵⁶

It has been recently held in Illinois that a bill of interpleader will be sustained, notwithstanding the fact that the party may protect himself by defending in the suit previously begun, and in all others that may be brought against him.⁵⁷

⁵³ *Du Bois v. Union* (1895), 89 Hun. N. Y. 382.

⁵⁴ *Cronin v. Cronin* (1886), 3 How. Pr. N. Y. 184.

⁵⁵ *Patterson v. Perry* (1857), 14 How. N. Y. 505.

⁵⁶ *Tanner v. European Bank* (1850), L. R. 1 Ex. 261; *Best v. Hayes* (1863), 1 H. & C. 718; See also *Pustet v. Flannelly* (1880), 60 How. N. Y. 67.

⁵⁷ *Oriental v. Nicholson* (1857), 3 Jur. N. S. 857; *Beck v. Stephani* (1854), 9 How. N. Y. 198; *Patterson v. Perry* (1857), 14 How. N. Y. 505; *Penn v. Watson* (1875), 2 W. N. C. Pa. 485.

⁵⁸ *National v. Platte* (1894), 54 Ill. App. 483.

Where courts of law and equity are fused, and equitable principles are followed in the consolidated court, the rule is clear that interpleader statutes are not at all to limit or affect the equitable jurisdiction of the court to entertain an interpleader suit or action. Such statutes merely furnish another special, cumulative and concurrent remedy, summary in its operation, and they do not alter the settled doctrines concerning interpleader. The statutory remedy is a mere substitution for the equitable remedy, in the kinds of actions to which it applies.³³

When statute must be used.—It must be remembered, however, that because the statutory provision is summary and convenient, whenever the applicant can avail himself of it, he will not be allowed to impose larger costs upon the fund or subject matter, by a bill or an action of interpleader.³⁴

Modern action of interpleader.—Where the statutory provisions governing interpleader are so extensive as to practically cover all cases in which interpleader is allowed in modern times, as is the case in England, Ontario and some other jurisdictions, it would seem that an action of interpleader is hardly necessary. It is to be noted, however, that there is nothing in any of the existing interpleader statutes forbidding an action of interpleader. It has been held in Ontario, in a sheriff's case, that if there is no summary remedy in any particular case, the court may allow him to avail himself of the old equitable jurisdiction and permit him to bring an action of interpleader.³⁵

Under many Interpleader Codes it is only where he has become a defendant in an action, that a stakeholder can make use of the summary statutory remedy, and when that is the case, and he is threatened by rival claimants who do

³³ *Beck v. Stephani* (1854), 9 How. N. Y. 193; *Patterson v. Perry* (1857), 14 How. N. Y. 505; *Cronin v. Cronin* (1886), 3 How. Pr. N. Y. 184; *Du Bois v. Union* (1895), 89 Hun. N. Y. 382; *Brock v. Southern Railway* (1895), 44 S. C. 444; *Board of Education v. Scoville* (1874), 13 Kan. 17.

³⁴ *Patterson v. Perry* (1857), 14 How. N. Y. 505; *McKay v. Draper* (1863), 27 N. Y. 256; *Henderson v. Watson* (1876), 23 Grant 355 (Ont.).

³⁵ *Standard v. Hughes* (1885), 11 Ont. Pr. 220.

not sue, the rule is clear, that he can, and must necessarily resort to a modern action of interpleader, framed like a bill of interpleader in equity, if he desires immediate relief.⁶¹ This course will also apply to other cases where relief cannot be had under a statute, but where it would have been granted in an interpleading suit in a court of Chancery.

Thus, under the Ohio Code, which allows a defendant to interplead only in actions upon contract or for the recovery of personal property, it was objected that an executor, who had been sued by the creditor of a legatee, and from whom the legacy was also claimed by the legatee's wife, could not have the remedy because the nature of the action was not covered by the Code. The court allowed the interpleader suit to proceed, and in so doing said: 'The case does not fall within either class named in the Code. The Code was intended as auxiliary to the Chancery Practice, and as directing the practice in the particular classes of cases named, but it was not intended to regulate the whole subject matter of interpleader. It has been the common understanding of the bench and bar, ever since the enactment of the Code, that the equitable action of interpleader still survives.'⁶²

In California, Georgia, Idaho, Montana, Pennsylvania, Utah, and Washington, the Codes provide specially for an action of interpleader in certain cases.

It has been suggested in New York State that a stakeholder may, if he so desires, maintain an action of interpleader, notwithstanding the fact that he might have applied in a summary way under the Code. The granting of relief under an interpleader statute or code, is always in the discretion of the court, and it follows, therefore, that the only remedy strictly of right, to a party sued by one or more of several claimants of the same debt of duty, and who claims no interest himself, is by an action of interpleader.⁶³

⁶¹ *Beck v. Stephani* (1854), 9 How. N. Y. 193; *McKay v. Draper* (1863), 27 N. Y. 258.

⁶² *First National Bank v. Beebe* (1900), 56 N. E. 485 (Ohio).

⁶³ *Barry v. Mutual Life* (1873), 53 N. Y. 596.

Interpleader by implication.—There may be interpleader jurisdiction by implication. In England the jurisdiction in interpleader was conferred by the Act on all the courts of common law, while the Bankruptcy Act of 1869 conferred on the London Court of Bankruptcy all the jurisdiction formerly possessed by the Superior Courts of Common Law; under these circumstances it was held that there was jurisdiction in the London Court of Bankruptcy to make an interpleader order.⁶⁴

Effect of Codification.—In Ontario, in 1887, the existing practice in interpleader was codified and embodied in rules of court, and the former provisions became thereby superseded. It has been held that these rules are not to be looked upon as new laws, but as a consolidation of the old, and unless a right which existed under the Interpleader Act prior to 1887 has been repealed by express language, it is to continue under the general wording of the rules; the court remarking that it must strive to construe the rules so as to continue the old law in force.⁶⁵

English Act did not extend to Colonies.—In England it has been held that the Interpleader Act does not extend to the colonies. It was said, that it does not follow, because the Legislature has chosen to intrust such extensive powers to the judges of Westminster Hall, that the judges of the colonial courts are to be intrusted with the same powers. This was said in reference to a case from the Island of Tobago.⁶⁶

Multiplepoinding.—In Scotland the legal proceeding corresponding to interpleader is known as multiplepoinding. This term, meaning literally double distress, is perhaps a more suitable and descriptive name for the remedy, than is the English term interpleader. The Scotch process is of equal antiquity with the English one, and is dealt with by statute as early as 1584.⁶⁷

⁶⁴ *Ex p. Sheriff of Middlesex* (1870), 10 Chy. Div. 575.

⁶⁵ *M'Laughlin v. Hammill* (1892), 22 Ont. 498; *Clancy v. Young* (1898), 15 Ont. Pr., p. 251.

⁶⁶ *Colonial Bank v. Warden* (1846), 10 Jur. 745.

⁶⁷ Act of James VI. 1584, c. 3.

It may be said that, while the chief end of interpleader is to protect a harrassed stakeholder, and incidentally to decide which of the claimants is entitled; the object of multiplepinding is to have it decided which of two or more parties is entitled to the property in medio, or in what proportions the fund is to be divided among several claimants, and incidentally to relieve the person who is subject to a double distress or double claim. In Scotland the scope of the process has become wider than in England, for an action of multiplepinding may be raised not only by the holder of the fund, but by one of the claimants as well.⁶⁸

The process is thus referred to in a recent decision of the Scotch Court of Session:—The practice of our courts warrants a much greater latitude in the case of the holder of the fund, than in the case of the competitors, and for the reason that the holder of the fund can never raise a direct action, and is not bound to remain a depositary till the day of his death, or till the disputing parties agree to settle their claims. He is entitled to be relieved by means of an action of multiplepinding after a reasonable⁶⁹ and accordingly it is a sufficient justification of the institution of the action, and is the criterion of its competency, that the claims intimated make it impossible for the depositary to pay to one of the parties without running the risk of an action at the instance of the other.⁷⁰ Under such circumstances he is allowed to consign the fund into court, leaving the two claimants to fight the matter out between themselves.⁷¹

The process has been referred to as a congeries of actions, because the claim of every one claiming in it, is held to be an action of the character necessary to each claimant to establish his title.⁷² It has also been described as one of the most valuable forms of judicial procedure,

⁶⁸ Green's Encyc. of Scots Law, Vol. 3, p. 377.

⁶⁹ Winchester v. Blakey (1890), Ct. of Session, 17 R. 1040.

⁷⁰ Agnew v. White (1890), Ct. of Session, 1 F. 1026. See also Pollard v. Galloway (1881), Ct. of Session, 9 R. 21.

⁷¹ Robb's Trustees v. Robb (1890), Ct. of Session, 7 R. 1049.

one of its most valuable effects being its safety;⁷³ while one judge remarked that he did not think that any cheaper or more convenient mode could be devised for trying the question which sooner or later had to be tried;⁷⁴ and another that the process was a very important and useful one which he was unwilling at any time unnecessarily to limit in its application.⁷⁴

On the other hand, while looked upon as a valuable form of process, the courts have always been unwilling to encourage multiplepoinding where there is another remedy open,⁷⁵ and though a useful action, is liable to abuse, and is not to be used in all circumstances.⁷⁶

Intervention. — Somewhat akin to interpleader is the legal proceeding known as intervention, a remedy of growing importance, especially in the United States. By means of it a third party who claims an interest in a subject matter in dispute between a plaintiff and a defendant gains admission to the action already commenced. He obtains this entrance at the discretion of the court, and it may be against the wishes of the original parties. In some jurisdictions the outsider who thus comes in is called the 'interpleader,' and the legal document by which he places himself on record is known as an interplea. This borrowed use of the term interpleader is not quite legitimate, and makes some confusion in the digesting of decisions. It is quite evident that while intervention may be a useful remedy, in allowing several claimants to gather in a common proceeding to settle their claims to one subject matter, it can never be as beneficial to a harassed stakeholder as is interpleader.

⁷³ *Stodart v. Bell* (1800), Ct. of Session, 22 D. 1092.

⁷⁴ *Royal Bank of Scotland v. Price* (1806), Ct. of Session, 20 R. 290.

⁷⁵ *Paterson v. Paterson* (1854), Ct. of Session, 17 D. 117.

⁷⁶ *Mitchell v. Strachan* (1860), Ct. of Session, 8 M. 154.

⁷⁷ *Logan v. Wilkie* (1855), Ct. of Session, 17 D. 485.

CHAPTER II.

THE APPLICANT.

Applicant in equity.—In courts of equity any person may interplead from whom the same debt, duty, or property, is claimed adversely by two or more claimants, provided such person can bring himself within the many rules which apply to bills of interpleader.

Under interpleader acts. — Under the English Act of 1831 a person could not interplead until he had first been sued by one of the claimants.

Provisions based on this Act, and which only allow relief to a defendant in an action, have been enacted and are now in force in the following jurisdictions: Alabama, Alaska, Arkansas, Colorado, Delaware, Indiana, Indian Territory, Iowa, Kansas, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Virginia, West Virginia, Wisconsin, Wyoming, Prince Edward Island, New Brunswick, New South Wales, Bermuda Islands, Hawaiian Islands.¹

In England under the present interpleader rules, a person may have relief whether he has been sued or not, so long as he can satisfy the court in other respects that he is entitled to its protection. The same practice now prevails in Ireland, Ontario, Manitoba, North-West Territories, British Columbia, Nova Scotia, Victoria, New Zealand, Georgia, Washington; while in California, Idaho, Montana, Pennsylvania and Utah, there is a double provision, one for

¹ See Appendix.

a defendant in an action, and the other for a person who has not been sued.²

Applicants enumerated.—The following are some of the many classes of persons or corporations who have sought relief in equity, or under some interpleader statute, and who have been protected or not, as they have been able to bring themselves within the principles which are applicable to interpleader:—

A tenant in equity.—From an early date it has been a general rule in equity, that a tenant cannot call upon his landlord to interplead with a stranger, that is with a person son claiming adversely to the lease and not through the landlord, because of the equitable principles that the adverse claims must have a common origin, and must be claims to the same subject-matter.³

The reason for this rule is, that if one party by a deliberate covenant with another engages to pay a sum of money, and the latter person has not by any dealing of his own entangled his right to recover the money so secured, it is not competent for the covenantor, on the ground that a claim is made by some person asserting a paramount title, to file a bill of interpleader;⁴ or, putting it in another way, where rights and liabilities exist between the tenant and landlord independent of the title of the property, and which may not depend upon the decision of the question of title, the tenant may not interplead.⁵

A tenant in equity may, however, file an interpleading bill against his landlord, when the third party's claim is founded upon an act of the landlord subsequent to the

² See Appendix.

³ *Handcock v. Shaen* (1701), 1 Colles. 122; *Smith v. Target* (1796), 2 Anstr. 529; *Johnston v. Atkinson* (1797), 3 Anstr. 798; *Wollaston v. Wright* (1797), 3 Anstr. 801; *Orane v. Burntrager* (1848), 1 Carter, Ind. 165; *Oil Run v. Gale* (1878), 6 W. Va. 523; *Whitbeck v. Whiting* (1895), 59 Ill. App. 520; *Whitney v. Cowan* (1878), 55 Miss. 626; *Dodd v. Bellows* (1878), 29 N. J. Eq. 127; see *contra*, *Alnete v. Bettam* (1559), 1 Carey 65; *Hall v. Craig* (1800), 125 Ind. 523.

⁴ *Cook v. Earl of Rosslyn* (1861), 1 Giff. 167.

⁵ *Crawshaw v. Thornton* (1887), 2 Myl. & C. 1.

lease,⁶ as where the third party claimed the rent by assignment from the landlord, or as purchaser from him of his estate.⁷ Thus, interpleader will lie when two persons claim the same rent in privity of tenure and contract, as in the case of mortgagor and mortgagee, trustee and *cestui que trust*, etc.⁸

A tenant, upon the death of his landlord, may also call upon two claimants of the rent by titles derived from the landlord to interplead,⁹ as where it is claimed by the devisee and the heir, the will being in dispute;¹⁰ or where the rent is claimed by two parties under different wills, there being a controversy as to which is the last will.¹¹

A tenant may interplead, if it appears that he does not stand in the relation of tenant and landlord to either claimant, as where he rented a house from a previous occupier and agreed to pay his rent to the person entitled to receive it.¹²

A tenant may also interplead, when his difficulty is, that he does not know which of the claimants is his landlord;¹³ but he cannot have relief, if he has rendered himself liable to both, by voluntarily taking an independent lease from each.¹⁴

A tenant cannot maintain an interpleader suit, if several are entitled to the rent, and all concur in demanding it, though there may be conflicting claims between them.¹⁵

⁶ *Cowtan v. Williams* (1808), 9 Ves. Jun. 107; *Clarke v. Byne* (1807), 13 Ves. Jun. 383a.

⁷ *Snodgrass v. Butler* (1876), 54 Miss. 45; *Ketcham v. Brazil* (1883), 86 Ind. 515.

⁸ *Dungey v. Angove* (1794), 2 Ves. Jun. 303; *Stern v. Jones*, 7 Kulp Pa. 19; *Adams v. Beach* (1850), 1 Phila. Pa. 90; *White v. Comegys* (1851), 2 Cart., Ind. 469; *Birmingham v. Tuite* (1872), 7 Ir. R. Eq. 221; *McNeill v. Ames* (1876), 120 Mass. 481; or, where both claimants consent, *Belbee v. Belbee* (1821), 6 Mad. 28.

⁹ *Badeau v. Tylee* (1844), 1 Sand. N. Y. 270.

¹⁰ *Doran v. Everitt* (1839), 2 Ir. Eq. R. 28; *Jew v. Wood* (1841), 3 Beav. 579.

¹¹ *Townley v. Deare* (1839), 3 Beav. 213.

¹² *Stephens v. Callanan* (1823), 12 Price 158.

¹³ *Richard v. Hyde* (1840), 2 Ir. Eq. R. 299; *Seaman v. Wright*, 12 Abb. Pr. N. Y. 304.

¹⁴ *Standley v. Roberts* (1894), 59 Fed. Rep. 836.

¹⁵ *Elliott v. Kempston* (1863), 15 Ir. Ch. R. 120.

Nor can a tenant interplead where no legal steps by distress or otherwise have been taken.¹⁶

Tenant under Interpleader Acts.—A tenant may interplead his landlord with a stranger, under the statutory provision which allows relief, although the titles of the claimants have not a common origin, but are adverse to and independent of one another.¹⁷

Landlord.—A landlord has been allowed to interplead, when, at the expiration of the lease, adverse claims were made upon him for the value of the tenant right, a third party claiming that he had purchased the right from the tenant.¹⁸

Owner of land.—The owner of land may interplead, when conflicting claims are made in respect of a rent charge upon the estate, and he cannot tell to which claimant he should pay the rent.¹⁹

Mortgagor.—A mortgagor of land will be allowed relief by interpleader, when adverse claims are made upon him for the mortgage moneys, the debt being claimed by one person alleging himself to be the original mortgagee, and by another who claims to be the assignee of the mortgage and has in his possession the mortgage deed.²⁰ The remedy of a mortgagor in this connection is sometimes said to be more in the nature of interpleader, than interpleader simply.²¹

Mortgagee.—When a mortgagee proceeds to a sale of the mortgaged premises under the power contained in his security, and a surplus remains in his hands after payment of his own claim, and there are adverse claims to such surplus he may interplead.²² A mortgagee may also inter-

¹⁶ Rowland v. Powell (1744), Ridgew 200.

¹⁷ Eng. Order LVII., Rule 3; Ont. Rule 1105; Schluter v. Harvey (1884), 65 Cal. 158; see also McDevitt v. Sullivan (1857), 8 Cal. 502.

¹⁸ Evans v. Wright (1865), 13 W. R. 408.

¹⁹ Duke of Bolton v. Williams (1793), 2 Ves. Jun. 151; Vyryan v. Vyryan (1861), 30 Beav. 65.

²⁰ Tauton v. Groh (1869), 4 Abb. App. N. Y. 358; see also Van Loan v. Squires (1889), 23 Abb. N. C. N. Y. 230.

²¹ Bedell v. Hoffman (1830), 2 Pal. N. Y. 109; Kopplinger v. O'Donnell (1889), 16 R. L. 417; and see chapter XV.

²² Western Canada v. Court (1877), 25 Grant, Ont., 151.

plead, where a portion of the loan is held back to satisfy a mechanics' lien, and the balance is also claimed by an execution creditor of the mortgagor's predecessor in title.²³

Ratepayer.—A ratepayer who is taxed in two different places for the same real or personal property, which is only liable to be taxed once, and when it is doubtful to which place the right to tax belongs, may interplead, and compel the tax collectors to settle the right between themselves.²⁴ He cannot interplead, however, when the tax claimed by one collector is double that demanded by the other, because he then has an interest in paying the lesser sum.²⁵ The remedy of a taxpayer under such circumstances, is, in some cases, said to be more in the nature of interpleader.²⁶

Executors and administrators.—An executor has such an interest in property which comes to his hands as executor, and for which he is sued by a person claiming by title paramount to that of his testator, as precludes him from calling on parties claiming under the will to interplead with such stranger. He cannot ask legatees, whose interest, it is his duty to protect, to assume the burdens of litigation which his office of executor imposes on him.²⁷ The same rule applies to an administrator,²⁸ and has been applied where the adverse claims were by the next of kin, and an assignee.²⁹ The proper course, for an executor or an administrator, is to apply to the court for directions.³⁰

There are cases, however, in which an executor or an administrator may obtain relief by way of interpleader. Thus an executor may interplead, when the description of a legatee is in some respects applicable to different persons, each of whom claim the legacy;³¹ where a debt is

²³ *Franco v. Joy* (1894), 56 Mo. App. 493.

²⁴ *Mohawk v. Clute* (1834), 4 Pal. N. Y. 384; *Thomson v. Ebbets* (1824), *Hopk. N. Y.* 272; *Robson v. Du Bose* (1837), 79 Ga. 721.

²⁵ *Greene v. Mumford* (1856), 4 R. I. 313.

²⁶ *Redfield v. Supervisors* (1839), 1 Clarke Eq. N. Y. 42; *Dorn v. Fox* (1874), 61 N. Y. 264; see also chapter XV.

²⁷ *Adams v. Dixon* (1856), 19 Ga. 513; *Davis v. Davis* (1895), 21 S. E. Rep. Ga. 1002; *Fitts v. Shaw* (1900), 46 A. 42 (R. I.).

²⁸ *Blue v. Watson* (1862), 50 Miss. 619.

²⁹ *Stevens v. Warren* (1806), 101 Mass. 564.

³⁰ *Dunn v. Campbell* (1890), 19 Atl. Rep. 1099.

³¹ *Morse v. Stearns* (1831), 131 Mass. 389.

claimed by both the executor and the trustee of the testator's deceased creditor;³³ or where the fund is claimed by a bank in whose favour the beneficiary has drawn on the executor, and by the solicitor for the beneficiary who has established the fund and claimed a lien for his costs and disbursements.³⁴

So, the executor of a judgment debtor has been allowed relief, when the debt was claimed by three parties, an assignee of the debt, the judgment creditor's assignee in insolvency, and the solicitor of the judgment creditor who claimed a lien for costs;³⁵ the administration of a deceased mortgagor, where the mortgage moneys were claimed by a creditor of the mortgagee and by the latter's assignee;³⁶ an administrator, where the moneys in his hands were claimed by the heir and by a purchaser from the heir;³⁷ an administrator with the will annexed, where there was a deficiency of assets, and claims were made by devisees and legatees;³⁸ while an executor sued by a creditor of a legatee, and also subjected to a demand from the legatee's wife has been allowed relief.³⁹

An executor, cannot however, interplead, until he has proved the will, and thus made himself a debtor by standing in the place of his testator by virtue of the probate.⁴⁰

An administrator, who is also heir,⁴¹ or an executor, who is also the residuary legatee, are as such, both interested in the fund, and cannot have interpleader.⁴²

An executor who has brought in his accounts and obtained an order directing how he is to distribute the funds, cannot then obtain relief by interpleader, upon a party not in the accounts claiming, the executor having known of

³³ *Wright v. Ward* (1827), 4 Russ. 215.

³⁴ *Jarvis v. Benedict* (1891), 37 N. Y. St. Repr. 598; *Davis v. Benedict* (1891), 20 Civ. Pro. N. Y. 263.

³⁵ *Jones v. Thomas* (1854), 4 Myl. & Cr. 180.

³⁶ *Cannon v. Kinney* (1848), 1 Sm. & M. 555 (Miss.).

³⁷ *Sessions v. Mansfield* (1864), 33 Ga. 9 Suplt.

³⁸ *Towle v. Swasey* (1870), 103 Mass. 100.

³⁹ *First National Bank v. Beebe* (1900), 56 N. E. 485 (Ohio).

⁴⁰ *Mitchell v. Smart* (1747), 3 Atk. 606.

⁴¹ *Lincoln v. Rutland* (1852), 24 Vt. 680.

⁴² *Ladd v. Chase* (1892), 155 Mass. 417.

the claimant but neglected to bring him into the Surrogate Court.⁴²

An administrator who has been ordered by a probate Court to pay over the estate to the beneficiaries entitled, cannot under ordinary circumstances maintain interpleader against those claiming the benefit of the order. The order is conclusive, unless appealed from. If it is general, not naming the distributees, the administrator may obtain a specific order.⁴³

Attorney.—A solicitor or an attorney, may in some instances interplead, when moneys collected for a client, or held for him, are claimed adversely.⁴⁴ A solicitor, who was employed by one member of a firm, after its dissolution, to collect a debt owing to the firm, was allowed relief when the moneys collected were claimed adversely by the former partners.⁴⁵

Agent in equity.—It is a well defined rule in equity, that an agent cannot call upon his principle to interplead with a stranger, that is with a person claiming by title alleged to be paramount to that of the principal, and this is founded upon the doctrine that interpleader will not lie, when the claims are adverse and independent of one another, and for the further reason, that rights and liabilities exist between such parties independent of the title to the property.⁴⁶ But if the principal has created a subsequent interest in some other person, the agent may maintain a bill of interpleader, because then the same debt or duty is claimed.⁴⁷

⁴² *Baker v. Brown* (1892), 94 Hun. 627.

⁴³ *Freeland v. Wilson* (1854), 18 Mo. 390.

⁴⁴ *Gibson v. Goldthwaite* (1845), 7 Ala. 281; *Beers v. Spooner* (1838), 9 Leigh Va. 153; *Friedman v. Platt* (1899), 21 N. Y. St. Rep. 190; *Sammis v. L'Engle* (1893), 19 Fla. 300. *Contra*, *Marvin v. Ellwood* (1844), 11 Pal. N. Y. 365.

⁴⁵ *Perkins v. Trippe* (1860), 40 Ga. 225.

⁴⁶ *Crawshay v. Thornton* (1837), 2 Myl. & C. 1; *Nickolson v. Knowles* (1820), 5 Mad. 47; *Watts v. Hammond* (1855), 3 W. R. 312; *Vosburgh v. Huntington* (1862), 15 Abb. Pr. N. Y. 254; *Snodgrass v. Butler* (1876), 54 Miss. 45; *Whitbeck v. Whiting* (1895), 59 Ill. App. 520; *McLaughlin v. Pitt* (1889), 6 N. S. Wales W. N. 109.

⁴⁷ *Smith v. Hammond* (1833), 6 Sim. 10; *Crawshay v. Thornton* (1837), 2 Myl. & C. 1; *McFadden v. Swinerton* (1900), 59 Pac. 316 (Oregon).

Agent under Interpleader Act.—An agent may, however, interplead his principal and a stranger, under the statutory provision, which allows relief although the titles of the claimants have not a common origin, but are adverse and independent of one another.⁴⁰

Carriers and bailees.—Common carriers and bailees of goods and chattels cannot as a general rule interplead in equity,⁴¹ unless the claims are connected or have a common origin,⁴² but can under the English practice. It has been said, that the remedy is for their protection against actions, which may be brought or threatened by rival claimants, and does not extend to goods in the possession of a carrier, which have been seized by an officer of the law under legal process.⁴³

A railway company, from which goods are claimed by a person holding the bill of lading, and who is other than the person named in the bill, may have relief when the person named in the bill also claims.⁴⁴

In Scotland a railway company may have similar relief by the process of multiplepounding.⁴⁵

Ship captain.—The captain of a ship, may in some cases have relief by interpleader, when two parties claim adversely under the bill of lading.⁴⁶

Harbour commissioners.—Harbour commissioners having money in their hands to pay freight, may interplead when it is claimed by two parties.⁴⁷

⁴⁰ See under topic—"Claims must be connected," C. V.; *Ware v. Western Bank, T. & H. Pr. Pa.* 433.

⁴¹ *Whitney v. Cowar* (1878), 55 Miss. 626; *McGaw v. Adams* (1837), 14 How. Pr. N. Y. 461. *Contrs* *Schuyler v. Hargous* (1865), 28 How. Pr. N. Y. 245. See under heading Doctrine of Independent Liability.

⁴² *Crawford v. Fisher* (1842), 1 Hare 436; *Pearson v. Cardon* (1831), 2 Russ. & Myl. 606; *McFadden v. Swinerton* (1800), 50 Pac. 816 (Oregon).

⁴³ *Merchants' Bank v. Peters* (1884), 1 Man. 372.

⁴⁴ *Brock v. Southern Railway Company* (1896), 44 N. C. 444.

⁴⁵ *North British Ry. Co. v. White* (1881), Court of Session, 9 R. 97.

⁴⁶ *Lowe v. Richardson* (1818), 3 Madd. 277; *Morley v. Thompson* (1819), 3 Madd. Index 564.

⁴⁷ *Belfast v. Lowther* (1864), 16 Ir. Ch. R. 34.

Warehouseman.—A rather fine distinction has been drawn in interpleader between a private and a public warehouseman. It was said that the private warehouseman could not interplead, because he was the agent of the principal depositing the goods, but where goods were deposited in a public bonded warehouse the person holding was the agent also of the person entitled, and interpleader might then be maintained against contending claimants.⁵⁶ Subsequently however, this distinction has been held not to be correct.⁵⁷

Auctioneer.—An auctioneer in making a sale, is considered the agent of both the vendor and the purchaser, and hence he becomes a mere depositary or stakeholder of that part of the purchase money which by the conditions of sale is required to be paid down. If the contract fails, and both parties claim the deposit, the auctioneer, not being able to decide between them, is entitled to relief by interpleader to compel them to adjust the matter between themselves.⁵⁸ Formerly, an auctioneer could not interplead, if he sought to retain his commission out of the moneys in his hands;⁵⁹ but now he is entitled to be relieved and to have his charges as well.⁶⁰

Trustee.—A trustee cannot ordinarily compel his *cestui que trust* to interplead with another,⁶¹ because he has a duty to perform and cannot be said to be disinterested. But he can, if an assignment by his *cestui que trust* is disputed.⁶²

In Scots law the process of multiplepounding is the common mode by which trustees seek to obtain judicial exoneration. Accordingly a trustee holding an estate is

⁵⁶ *Cooper v. De Tastet* (1829), Taml. 177.

⁵⁷ *Crawshaw v. Thornton* (1837), 2 Myl. & C. 1.

⁵⁸ *Fairbrother v. Prattent* (1818), 1 Dan. 64; *Hoggart v. Cutts* (1841), 1 Cr. & Phil. 197; *Bleeker v. Graham* (1836), 2 Ed Ch. N. Y. 647.

⁵⁹ *Yates v. Farebrother* (1819), 4 Madd. 239; *Mitchell v. Hayne* (1824), 12 Sim. & Stu. 68.

⁶⁰ *Best v. Hayes* (1863), 1 H. & C. 713.

⁶¹ *Bird v. Fak* (1861), 2 Pinn. Wils. 69.

⁶² 36 & 37 Vict. c. 66, s. 25 (6). Eng.; R. S. Ont. 1907, c. 51, s. 58 (6).

permitted to throw it into court by a multiplepounding where there are competing and hostile claims, where the beneficiaries will not concur in granting a valid discharge,⁶⁵ where there is a question as to the validity of the trust deed,⁶⁶ or where there has been great delay in winding up the estate.⁶⁷ The process is to be considered not merely one of multiplepounding but also of exoneration.⁶⁸

A debtor.—A debtor, as a general rule, can interplead when the debt owing by him is claimed by different persons, as by his creditor and his creditor's assignee in bankruptcy,⁶⁹ by his creditor's ordinary assignee and his creditor's trustee in bankruptcy,⁷⁰ by his creditor's assignee and his creditor's judgment creditor;⁷¹ or by his judgment creditor and his judgment creditor's solicitor claiming a lien for his costs.⁷²

But a debtor cannot maintain a bill of interpleader, in which he seeks to stay the action of the first claimant, until it can be determined, whether the second claimant owes the first a sum which can be applied on the debtor's liability;⁷³ nor can he interplead, as will be pointed out presently, when he has allowed his debt to ripen into a judgment against him, knowing all the while of another claimant.⁷⁴

Where moneys payable by a judgment debtor in Scotland for costs, were claimed by creditors of the judgment creditor and also by the law agent, who had recovered the judgment, multiplepounding was held competent.⁷⁵

⁶⁵ *Connell's Trustee v. Chalk* (1878), Ct. of Session, 5 R. 375; *Kyd v. Waterson* (1880), Ct. of Session, 7 R. 384; *Ogilvy v. Chevallier* (1874), Ct. of Session, 1 R. 693.

⁶⁶ *Hall v. Macdonald* (1892), Ct. of Session, 19 R. 567.

⁶⁷ *Dunbar v. Sinclair* (1850), Ct. of Session, 13 D. 54.

⁶⁸ *Blair v. Blair* (1863), Ct. of Session, 2 M. 284. For case when relief refused see *Mackenzie v. Sutherland* (1895), Ct. of Session, 22 R. 233.

⁶⁹ *Lowndes v. Cornford* (1811), 18 Ves. Jun. 290; *contra* *Harlow v. Crowley* (1813), 1 Buck. 273.

⁷⁰ *Re Hilton* (1892), 67 L. T. 594.

⁷¹ *Drake v. Woodford* (1890), 33 N. Y. St. Rep. 904.

⁷² *— v. Bolton* (1811), 18 Ves. Jun. 292.

⁷³ *Smith v. Kuhl* (1874), 25 N. J. Eq. 36.

⁷⁴ *Collins v. Angell* (1887), 72 Cal. 513.

⁷⁵ *Pollard v. Galloway* (1881), Ct. of Session, 9 R. 21. For relief refused, see *Mitchell v. Strachan* (1890), Ct. of Session, 8 M. 154.

Garnishee.—A garnishee can ordinarily interplead, when the debt, which the attaching creditor is seeking payment of, is also claimed by a third party, such as an assignee of the judgment debtor;⁷⁴ or where the third party is a judgment creditor of the judgment debtor.⁷⁵ A garnishee can always file his bill in equity,⁷⁶ but it has been held, that he is not a defendant within such interpleader statutes, as give a defendant who is sued, the right to interplead, when a third party claims the same debt.⁷⁷

On the principle, that interpleader does not lie after a judgment has been recovered by one of the claimants, a garnishee cannot interplead, when a claimant appears after the attaching order has been made absolute;⁷⁸ nor can he obtain relief, when the debt has been attached by different creditors, and each has obtained an attaching order, which may result in the garnishee being compelled to pay more than the amount of his debt;⁷⁹ nor after judgment has been had against him by both an attaching creditor and a third party.⁸⁰ Under the Mississippi Code, a garnishee may interplead after judgment, if previous to judgment he had no notice of the adverse claim.⁸¹

⁷⁴ *Iglehart v. Moore* (1858), 21 Texas 501; *Hardy v. Hunt* (1858), 11 Cal. 343; *Livingstone v. Bank* (1896), 50 Ill. App. 562; *Rodgers v. Santa Claus Co.*, 27 W. N. C. Pa. 574; *Pratt v. Myers* (1892), 28 Abb. N. C. N. Y. 460; *Morin v. Bailey* (1878), 55 Miss. 570; *Pope v. Ames* (1890), 25 Pac. Rep., Oregon, 398; *Kelly Grain Co. v. English* (1896), 34 S. W. Rep. (Texas) 651; *Davidson v. Douglas* (1865), 12 Grant, Ont., 181; *Armit v. Hudson Bay Company* (1886), 3 Man. 529; *McPhillips v. Wolf* (1887), 4 Man. 300.

⁷⁵ *Webster v. McDaniel* (1862), 2 Del. Ch. 297; *Hastings v. Cropper* (1887), 3 Del. Ch. 165; *Mosher v. Bruhn* (1896), 15 Wash. 332.

⁷⁶ *Henderson v. Garrett* (1853), 35 Miss. 554; *Horton v. Grant* (1879), 56 Miss. 404; *Wilbraham v. Horrocks* (1879), 8 W. N. C. Pa. 285; *Hamilton v. Hitner*, 8 Montg. Pa. 195.

⁷⁷ *Kerr v. Fullerton* (1887), 3 Ont. Pr. 19; *Spencer v. Conley* (1876), 26 Upper Canada C. P. 274; *Hamilton v. Bovaird* (1876), 10 Ir. L. T. R. 167.

⁷⁸ *Randall v. Lithgow* (1884), 12 Q. B. D. 525; *Providence v. Barr* (1890), 17 R. I. 131.

⁷⁹ *Victoria v. Bethune* (1877), 23 Grant, Ont., 508; 1 Ont. App. 398.

⁸⁰ *Yarborough v. Thompson* (1844), 3 Smed. & M. 291 Miss.; *Donaher v. Prentiss* (1867), 22 Wis. 311.

⁸¹ *Dodds v. Gregory* (1883), 61 Miss. 351.

A garnishee cannot call upon the attaching creditor to interplead with the execution debtor;⁵³ nor can a garnishee have relief when the third party is the attaching creditor's assignee in insolvency, and the claim might have been disposed of in the garnishment proceedings;⁵⁴ and when a statute prohibits the issuing of an injunction to stay attachment proceedings, a garnishee cannot call upon the attaching creditor to interplead with a third party claiming the debt, so that the attachment proceedings shall be stayed.⁵⁵

Where two suitors are seeking to recover from a general debtor, the one upon express contract, and the other upon garnishment, this has been held no sufficient identity of claims as contemplated by the Idaho Code.⁵⁶

Acceptor of a bill.—The acceptor of a bill of exchange may obtain relief, when the debt secured by the bill is claimed by two different parties,⁵⁷ and so may the drawer.⁵⁸

Maker of a note.—The maker of a promissory note is also entitled to protection when conflicting claims arise.⁵⁹

Municipal corporation.—A municipal corporation has been held entitled to relief by interpleader, where one-half of a fine for violation of a liquor law was claimed by two parties, each alleging that he had instituted the proceedings in which the fine had been imposed;⁶⁰ also, where damages awarded for land taken by a corporation, were claimed

⁵³ *United States v. Wiley* (1864), 41 Barb. N. Y. 477.

⁵⁴ *Picken v. Victoria* (1879), 44 U. C. Q. B. 372.

⁵⁵ *McWhirter v. Halsted* (1885), 24 Fed. Rep. 826, N.J.

⁵⁶ *McCauley v. Sears* (1898), 34 Pac. Rep. 814.

⁵⁷ *Gibbs v. Gibbs* (1858), 6 W. R. 415; *Gerhard v. Montague* (1880), 38 W. R. 76; *Regan v. Searle* (1840), 9 Dowl. 103; *Contra Baker v. Bank of Australasia* (1857), 1 C. B. N. S. 515. For the same relief in Scotland, see *Agnew v. White* (1809), Ct. of Session, 1 F. 1026.

⁵⁸ *Bell v. Hunt* (1849), 8 Barb. Ch. N. Y. 391.

⁵⁹ *Van Buskirk v. Roy* (1858), 8 How. Pr. N. Y. 425; *Howe v. Gifford* (1873), 66 Barb. N. Y. 597; *Rohrer v. Turrill* (1860), 4 Minn. 407; *Briant v. Reed* (1802), 14 N. J. Eq. 271; *Fahie v. Lindsay* (1880), 8 Oregon 474; *Fitch v. Brower* (1893), 42 N. J. Eq. 300; *Bechtel v. Sheaffer* (1888), 117 Pa. St. 555; *McClintock v. Helberg* (1897), 166 Ill. 384; *Gill v. Cook* (1869), 42 Vt. 140; *Pool v. Lloyd* (1848), 46 Mass. 525.

⁶⁰ *Webster v. Hall* (1860), 60 N. H. 7.

by two.⁸⁰ Where a balance due for bridge plans, was claimed by the engineer who prepared them, and by his solicitor who acted in ascertaining the amount, and who claimed a lien for his costs, a city corporation was allowed to interplead.⁸¹

A bank.—Upon the general principles of equity jurisprudence, a bank may be entitled to relief by bill of interpleader, against separate and adversary parties, who claim title to moneys therein deposited, and that, whether the money was deposited by the claimants jointly or not.⁸² It may also interplead, when adverse claims are made to shares of the bank's stock, or to dividends thereon,⁸³ or to property of any sort deposited in the bank for safe keeping.⁸⁴

But a savings bank cannot interplead, when sued by the holder of a draft, which has not been accepted.⁸⁵

Safety deposit company.—A safety deposit company may also interplead over property left in its custody.⁸⁶

Surety company.—A surety company will be relieved when two adverse parties claim a sum of money for which it is liable.⁸⁷

⁸⁰ *Barnes v. New York* (1882), 27 Hun. N. Y. 236; *Keller v. Bading* (1890), 64 Ill. App. 198.

⁸¹ *City of Atlanta v. McDaniel* (1895), 96 Ga. 190.

⁸² *Crellin v. Leland* (1842), 6 Jurist. 738; *City Bank of N. Y. v. Skelton* (1846), 2 Blatchf. N. Y. 14; *German Exchange Bank v. Board of Commissioners* (1879), 57 How. N. Y. 187; *Smith v. Emigrant Industrial Savings Bank* (1893), 17 N. Y. St. Rep. 852; *Bruggemann v. Bank of the Metropolis*, 1 Rob. C. C. N. Y. 86; *Du Bois v. Union Dime Savings Institution* (1895), 89 Hun. N. Y. 382; *Harrisburg Bank v. Heister* (1875), 2 Pears. Pa. 255; *Rahway Savings Institution v. Drake* (1874), 25 N. J. Eq. 220; *First National Bank v. West* (1874), 46 Vt. 633; *Dickenschied v. Exchange Bank* (1886), 28 W. Va. 340; *Foss v. First National Bank* (1880), 3 Fed. R. Col. 185; *Wayne County Savings Bank v. Airey* (1893), 115 Mich. 520; *Royal Bank of Scotland v. Price* (1896), Ct. of Session, 20 R. 290; *Commercial Bank of Scotland v. Muir* (1897), Ct. of Session, 25 R. 219.

⁸³ *Providence v. Wilkinson* (1857), 4 R. I. 507; *Cady v. Potter* (1869), 58 Barb. N. Y. 403.

⁸⁴ *Langston v. Boylston* (1798), 2 Ves. Jun. 101; *Nolan v. London* (1889), 6 N. S. Wales W. N. 127.

⁸⁵ *Master v. Bowery Savg. Bank* (1900), 63 N. Y. S. 964.

⁸⁶ *Mercantile v. Dimon* (1896), 55 N. Y. St. Rep. 209; *Mercantile v. Huntington* (1895), 89 Hun. N. Y. 465.

⁸⁷ *Bacon v. American Surety Co.* (1900), 53 App. Div. 150 N. Y.

Insurance companies.—Insurance companies very frequently require protection, in respect of adverse claims, when insurance moneys become payable, and relief will be afforded to life,⁸⁷ and fire⁸⁸ insurance companies, as well as to fraternal orders and benefit societies.⁸⁹

Lottery company.—Lottery companies have been allowed relief, as where a lottery ticket which had won a prize was claimed by two persons.¹

A purchaser.—A purchaser of goods may interplead, as where two persons, each claimed to be the vendor, and each claimed the price;² where a purchaser was sued by an assignee of the vendor, and alleged that he had been made a garnishee in a foreign attachment proceeding, at which time he had no notice of the assignment he was allowed to interplead.³

Hotel guest.—A guest at a hotel may interplead when payment of his bill is asked by two persons, each claiming to be owner of the hotel.⁴

A bishop.—A bishop has been allowed relief by interpleader, where he had acted under a writ of *fieri facias de bonis ecclesiasticis*.⁵

Church officers.—In Scotland the officers of a church, whose school house had been expropriated by a railway company, were allowed to raise a multiplepoinding where

⁸⁷ *Spring v. South Carolina Insurance Co.* (1823), 8 Wheat. U. S. 268; *Emerick v. New York Life* (1879), 49 Md. 352; *Clark v. Mosher* (1867), 107 N. Y. 118; *Hartford Life and Annuity Ins. Co. v. Cummings* (1897), 50 Neb. 236; *McKenzie v. Aetna* (1879), Russell Eq. Dec. Nova Scotia 346; *Woolworth v. Phoenix* (1898), 25 App. Div. N. Y. 629.

⁸⁸ *Paris v. Gilham* (1813), Cooper p. 59; *Sexton v. Home Fire Insurance Co.* (1898), 54 N. Y. S. 862.

⁸⁹ *Feldman v. Grand Lodge* (1892), 46 N. Y. St. Rep. 122; *Order of the Golden Cross v. Merrick* (1895), 168 Mass. 374; *Sullivan v. Knights of Father Matthew* (1897), 73 Mo. App. 43.

¹ *Yates v. Tisdale* (1837), 3 Ed. Ch. N. Y. 71; *Louisiana v. Clark* (1883), 16 Fed. Rep. (Lou.) 20.

² *Johnston v. Lewis* (1867), 4 Abb. N. C. Pr. N. Y. 150; *Tynan v. Cadenas* (1885), 3 How. Pr. N. S. N. Y. 73.

³ *Barnes v. Bamberger* (1900), 196 Pa. St. 123.

⁴ *Gill v. Scrope* (1850), 2 Ir. Jur. O. S. 182.

⁵ *Hammon v. Navin* (1841), 1 Dowl. N. S. 351.

the damages paid were claimed by a school board and a kirk session.⁶

Assignee for creditors.—An assignee for creditors, who had in his possession, a fund, the proceeds of goods sold by him, was allowed relief by interpleader, where the money was claimed by the creditors, and by chattel mortgagees.⁷

A claimant cannot interplead.—An action of interpleader cannot be maintained, by one of several claimants of a fund in the hands of a third party, but only by such third person himself.⁸ The debtor alone, and not the creditor, is the proper party to institute proceedings.⁹ If the remedy be not asked by a defendant of record, a third party will not be allowed to intervene.¹⁰ Therefore where the interpleader was not commenced by the applicant himself, but by the applicant's attorney, at the expense and for the benefit of one of the two claimants, after the other had recovered judgment in an action brought against the applicant, and in defence of which the same attorney had pleaded the right of the first claimant, it was held that to allow interpleader to be maintained, would be to contravene the general principles of equity.¹¹ The protection required is for the holder of the fund, and if he does not invoke it for himself, another cannot do it for him. Courts of justice are not open, like tournaments, for knights errant to enter and tilt at pleasure.¹²

A different rule in Scotland.—In Scots law the practice in an action of multiplepounding is different, for there the process may be raised by a competing party in the name of the neutral person, that is a claimant may commence the proceeding in the name of the holder of the fund.¹³ More

⁶ *Monkland v. Bargeedle* (1896), Ct. of Session, 21 R. 122.

⁷ *Re Gregg's Assignment, Fee v. Wolfe* (1896), 74 Mo. App. 58. See *Castner v. Twitchell* (1896), 91 Me. 524; and chapter XI.

⁸ *Arn v. Arn* (1899), 2 Mo. A. Repr. 734; *Wenstrom v. Bloomer* (1895), 85 Hun. N. Y. 389.

⁹ *Kortjohn v. Seimera* (1888), 27 Mo. App. 271.

¹⁰ *Allison v. Elbersson* (1874), 1 W. N. C. Pa. 388; *Good v. Briggs*, 5 Kulp. Pa. 190; *Browning v. Hillig* (1897), 69 Mo. App. 594.

¹¹ *Provident Institution v. White* (1874), 115 Mass. 112.

¹² *Porter v. West* (1893), 64 Minn. 548.

¹³ *Winchester v. Blakey* (1890), Ct. of Session, 17 R. 1046; *Jamieson v. Robertson* (1886), Ct. of Session, 16 R. 15.

indulgence is accorded when the person in possession himself applies.¹⁴

A servant.—A servant cannot have interpleader, when it is his master who is in danger, thus, where rival claimants took proceedings against a ship, in respect of goods which had been on board, it was held that the captain could not interplead, because the proceedings were not against him but against the ship, the parties really requiring relief being the owners.¹⁵

Agent for his principal.—An agent cannot institute proceedings on behalf of his principal, the latter must interplead himself.¹⁶

Owner of building in course of erection.—The owner of a building, newly erected, or in course of erection, may require rival claimants, such as the contractor, sub-contractor, or assignees, or creditors of these, to interplead, and to establish between themselves their demands against the moneys owing upon the building contract.¹⁷

It has been held in Maryland, however, where some of the claimants were lienholders, and the owner admitted a balance that was not sufficient to pay them in full, that the owner could not maintain a bill of interpleader, because the lien holders are not restricted to the amount due the contractor. They have no concern in the state of the account between these parties, they make their claim against the building, and they have a right to be paid by a sale of it. The effect of allowing interpleader, would be, to make the lien claimants accept the personal responsibility of the owner, in place of their security on the building, and to compel them to determine by litigation with each other, the dividends which they should receive. This cannot be done.¹⁸

¹⁴ *Fraser v. Wallace* (1896), Ct. of Session. 20 R. 374.

¹⁵ *Sablicich v. Russell* (1896), L. R. 2 Eq. 441.

¹⁶ *Hechmer v. Gilligan* (1896), 28 W. Va. 750.

¹⁷ *Trenton v. Heath* (1862), 15 N. J. Eq. 22; *Independent School District v. Mardis* (1896), 106 Iowa 295; *Lapenta v. Lettieri* (1899), 44 Atl. 730 (Conn.); *Busse v. Voss*, 13 Weekly Law Bulletin 542 (Ohio); *School District v. Weston* (1875), 31 Mich. 86.

¹⁸ *Ammendale v. Anderson* (1899), 71 Md. 126.

Defendant in replevin.—A defendant in a replevin action cannot compel the plaintiff, and an adverse claimant of the property, to interplead, he must deliver it to the sheriff.¹⁹

Tax collector.—When a tax collector has sold a property for arrears of taxes, and has a surplus which is claimed by the former owner and his mortgagee, he may protect himself by interpleading.²⁰

In mandamus.—A person to whom a writ of mandamus is issued in England or Ontario, in respect of which he claims no right or interest, or whose functions are merely ministerial, may in a case of difficulty, bring before the court all persons claiming any right or interest in or to the matter of the mandamus, and the court may make an order as upon an ordinary interpleader application.²¹

Subordinate judicial officers.—Subordinate judicial officers, who are clothed with the duty of distributing funds among certain beneficiaries in pursuance of a decree or order, cannot have relief by interpleader, when claims are made conflicting with the direction under which they are acting. Thus, where a Master in Chancery had the custody of a fund, merely for the purpose of distributing it under a decree in partition, it was held that a bill of interpleader would not lie, for the purpose of determining the rights of persons claiming to be assignees of a distributee.²² In the same way, interpleader was refused to commissioners, appointed to make partition or sale, where conflicting claims were made to the proceeds after a sale.²³ The reason for this is, that the officer runs no risk in obeying the direction of the court, and so needs no protection.

The sheriff at Common Law.—Courts of Common Law, in England, always gave the sheriff, before there was any

¹⁹ *Lynch v. St. John* (1878), 8 Daly N. Y. 142. *Contra*, *McDonald v. Kortosk* (1890), *Nova Scotia Digest* 752.

²⁰ *McDuffee v. Collins* (1897), 117 Ala. 487.

²¹ *English Crown Office*, Rule 76 of 1896; *Ont.*, Rule 1086 of 1897.

²² *Moore v. Partlow* (1890), 84 Ill. App. 381; *Partlow v. Moore* (1900), 56 N. E. 317 (Ill.); *Campbell* (1870), *Ct. of Session*, 8 M. 989 (Scotland).

²³ *Michenor v. Lloyd* (1863), 16 N. J. Eq. 38.

Interpleader Act, all the protection due him as a public officer, when he acted within the scope of his duty. As between the sheriff, a judgment creditor, and a third party claiming goods taken in execution, the court took care, that the sheriff should not be made an instrument of trying at his own expense the validity of the claim. The course was, to interfere when he came promptly and had acted indifferently and equally between the parties, and to administer to him, all the equity which a court of equity would give upon a bill of interpleader, and this was uniformly done upon motion.²⁴ The courts, on the suggestion of a reasonable doubt, protected him, by enlarging the time for making his return, until the rights should be tried between the contending parties, or until one of them had given him a sufficient indemnity.²⁵ Thus, where a claimant sued the sheriff for trespass, and neither party would indemnify him, the court on the principle that a sheriff must not at his own expense fight the cause of the contending parties, stayed the proceedings until an indemnity should be given.²⁶

In English Courts of Equity.—In England, the oldest rule in equity was, that a sheriff was precluded from stating a case of interpleader, when property taken in execution was claimed by a stranger to the writ, because the sheriff had to admit, that as to some of the defendants he was a wrongdoer.²⁷ By 1886 however, the Master of the Rolls said:—I doubt, having reference to modern decisions, whether I should be disposed to fix the rule so tightly, as to say, that a sheriff cannot now file a bill of interpleader at all. But, it is clear, that he cannot do so until he has informed the judgment creditors of the adverse claim, and ascertained whether they will resist the claim, or give the

²⁴ *Bernasconi v. Fairbrother* (1827), 7 B. & C., p. 381.

²⁵ *Tidd's C. L. Pr.*, 8th Ed. (1824), p. 1057.

²⁶ *Beavan v. Dawson* (1830), 6 Bing. 508. See also *Bolt v. Stanway* (1794), 2 Anstr. 556; *King v. Bridges* (1817), 7 Taunt. 204; *Dewey v. White* (1871), 65 N. Car. 225.

²⁷ *Slingsley v. Boulton* (1813), 1 Ves. & B. 334; *Onyon v. Washbourne* (1850), 14 Jur 497.

goods up.²⁰ Finally, it became the practice in equity to allow the sheriff a bill of interpleader, when conflicting equitable claims were made to the property seized.²⁰

In United States Courts. — In the United States, the equitable practice has been somewhat variable. Sometimes, following the early English Rule, the sheriff has been refused his bill.²⁰ Under other conditions he has been held entitled to it, as where some of the defendants by unusual instructions have placed him in his difficulty;²¹ or where, the claimants are two contending execution creditors, or an assignee in bankruptcy of the execution debtor and the execution creditor, because as to them he cannot be held a wrongdoer.²² In one instance, he was allowed a bill, but without an injunction to stay any suit against him.²³ In other cases, he had been allowed his bill apparently as a matter of right.²⁴

British Statutes.—The English Act of 1831, was the first interpleader statute for the relief of sheriffs, and other officers. It permitted the remedy, whenever goods taken or intended to be taken in execution, were the subject of claims by assignees of bankrupts, and other persons, not being the parties against whom the process issued. The original enactment is continued in the present English Rules, which provide, that relief by way of interpleader may be granted where the applicant is a sheriff or other officer charged with the execution of process, and claim is made to any money, goods, or chattels taken or intended to be

²⁰ *Dalton v. Furness* (1836), 35 Beav. 461. See also *Tufton v. Harding* (1859), 6 Jur. N. S. 116.

²¹ *Hale v. Saloon Omnibus Co.* (1859), 4 Drew, p. 500; *Child v. Mann* (1867), L. R. 3 Eq. 806; *Daniell's Chy. Pr.*, 4th Ed. (1871), p. 1416.

²² *Quinn v. Patton* (1841), 2 Ired. Eq. (N. C.) 48; *Shaw v. Ooster* (1840), 8 Pal. N. Y. 339; *Parker v. Barker* (1860), 42 N. H. 78; *McDonald v. Allen* (1875), 37 Wis. 108; *Rock v. Cook* (1848), 2 Phil. (Pa.) 691.

²³ *Shaw v. Chester* (1834), 2 Ed. Ch. N. Y. 405.

²⁴ *Dewey v. White* (1871), 65 N. Car. 225; *Fairbanks v. Belknap* (1888), 135 Mass. 179.

²⁵ *Storrs v. Payne* (1810), 4 Hen. & M. (Va.) 506.

²⁶ *Henderson v. Richardson* (1843), 5 Ala. 349; *Kring v. Green* (1846), 10 Mo. 185; *Lawson v. Jordan* (1858), 19 Ark. 297; *Turner v. Lawrence* (1847), 11 Ala. 426.

taken in execution under any process, or to the proceeds or value thereof, by any person other than the person against whom the process issued. A clause, essentially similar, appears in the interpleader statutes which are in force in Ireland and in other parts of the British Empire.²⁵

United States Codes.—In 1848, Pennsylvania adopted the second part of the English Act of 1831 for the relief of sheriffs, it has also been copied by Virginia and West Virginia; while the following States have enacted a less comprehensive provision, which allows a sheriff to interplead when he has been sued and is defendant in an action, namely, Arkansas, Indian Territory, Iowa, Kansas, Mississippi, Nebraska, Ohio, Oklahoma and Wyoming. It has been held in Pennsylvania, that so long as a claim to the property exists and is undetermined, the sheriff has a right to interplead.²⁶

In the other American States, there are a variety of provisions by which a sheriff is as a rule only partially protected from his difficulties. In some he may empanel a jury to try the claimants' titles. Sometimes this is looked on as a judicial provision, sometimes not, while in many States the decision is not binding on the claimant. In other States, following the practice in England before the interpleader Act, the sheriff may demand a bond of indemnity from the execution plaintiff, and if this is denied him he must take the risk of refusing to seize, or of abandoning the levy, if a seizure has been made. In others, there is a process by which the claimant intervenes and takes the goods, upon giving a bond, the sheriff dropping out, when the other parties without his presence determine the matter between themselves. This is known as 'intervention,' and the claimant intervening is sometimes designated the interpleader, but more generally the intervenor.²⁷

Effect of a sheriff's proceeding.—The nature and effect of a sheriff's proceeding were recently stated by Lord Esher

²⁵ *Hoe Appendix.*

²⁶ *Hall v. Vanderpool* (1806), 156 Pa. St. 152.

²⁷ See *Murfee on Sheriffs*, U. S. 1884 c. 13; *Freeman on Executions*, 1900; Cap. xvii.

in England, as follows: A writ of *fi. fa.* is put in the hands of the sheriff, directing him to seize the goods of a particular person, the judgment debtor. He does seize goods in the possession of the judgment debtor. Thereupon, another person comes forward and claims the goods as his. That would put the sheriff in the position of having to determine whose the goods really are, whether they are the execution creditors or the claimants. But the legislature provides, that the sheriff may come to the court, to determine who is right or wrong, the claimant or the execution creditor. As soon as the sheriff has got his interpleader order, he is protected. The court then has to perform the duty of determining to whom the goods belong.³³

Other officer.—The words "sheriff or other officer" have been held to include, a lord of the manor,³⁴ a coroner³⁵ when he has sheriff's duties to perform; a receiver appointed by the court,³⁶ as well as the sheriff's under-sheriff, deputy sheriff, bailiff, or constable, when they respectively require protection.³⁷ The Ontario Rule recites, that sheriff shall mean, a sheriff, coroner, elisor, or other officer.³⁸

A sub-sheriff cannot interplead for the high sheriff, when it is the latter who requires protection,³⁹ and officers of inferior courts have been held not to be within the provisions of the Interpleader Act.⁴⁰

Sheriff as a stakeholder.—A sheriff may sometimes apply for relief under the statutory provision for the relief of stakeholders, when he cannot properly bring himself under the special provision made for sheriffs. Thus, a sheriff was allowed to interplead where he had paid the execution creditor out of the proceeds of the levy, and still

³³ *Discount Banking Co. v. Lambarde* (1893), 9 T. L. R. 612; 63 L. J. Q. B., p. 23.

³⁴ *Ibbotson v. Chandler* (1841), 9 Dowl. 250.

³⁵ *Quinton v. Butt* (1830), 5 Ir. Jur. N. S. 180.

³⁶ *Levasseur v. Mason* (1891), 2 Q. B. 7; *Wells v. Hews* (1876), 24 Grant, Ont., 181.

³⁷ *Linton v. Pollock*, 5 C. C. Pa. 243.

³⁸ Ont. Rule 1102 (C.) of 1897.

³⁹ *Freeman v. Mountcashel* (1849), 12 Ir. L. R. 553.

⁴⁰ *Moylan v. Rogers* (1848), 10 Ir. L. R. 203.

had a balance in his hands, which both the execution creditor and the claimant claimed.⁴⁶ It has been said too, that if there is no summary remedy in any particular case, the court may allow the sheriff to avail himself of the old equitable jurisdiction, and permit him to bring an action of interpleader.⁴⁷

Sheriff not bound to interplead. — A sheriff is never bound to interplead under the Act, and a claimant cannot compel him to take the benefit of it,⁴⁸ because it was passed for the relief of the sheriff, not of the parties claiming the property seized.⁴⁹

Where a sheriff has received instructions with the writ, that a claim, if made, will be contested, he is not bound to take interpleader proceedings immediately the claim is made, without further instructions;⁵⁰ and where goods seized have been previously assigned by the execution debtor to a third person, as security for a debt, the sheriff is not bound to interplead, and thereby enable proceedings to be taken, but is at liberty to withdraw, though the value of the goods seized exceeds the sum secured by the assignment, and the debtor has an equity which is valuable.⁵¹ The sheriff's duty in such a case would be to sell the equity of redemption.

When sheriff refused relief.—The granting of an issue is a matter of sound discretion, and the refusal of it, leaves the sheriff in the same position as if it had not been asked, nor does it affect the right of the claimant, who has no right to demand an issue.⁵²

The court, although refusing the sheriff's application, may yet in lieu thereof, enlarge the time for him to return

⁴⁶ *Ormsby v. Wright* (1898), 27 Ir. L. T. R. 184; *Warnock v. Leslie* (1882), 10 Ir. R. C. L. 68; *Walter v. Nicholson* (1888), 6 Dowl. 517; but see *Re Gould v. Hope* (1898), 20 Ont. App. 347, in which the Court was divided.

⁴⁷ *Standard v. Hughes* (1885), 11 Ont. Pr. 220.

⁴⁸ *Harrison v. Forster* (1886), 4 Dowl. 558.

⁴⁹ *Dempsey v. Caspar* (1854), 1 Ont. Pr. 180; *Bain v. Funk* (1869), 61 Pa. St. 185.

⁵⁰ *McGee v. Anderson* (1857), 6 Vict. L. R. (L.) 414.

⁵¹ *Scarlett v. Hanson* (1883), 12 Q. B. D. 213; *English Order* LVII., r. 12; Ont. Rule 1112 of 1897.

⁵² *Bain v. Funk* (1869), 61 Pa. St. 185.

the writ,⁵⁶ and he is entitled to a reasonable time to make his return, after the disposal of his application, before an attachment can issue against him.⁵⁷ It has been held in Ireland, that the Interpleader Act does not abolish the sheriff's power of proceeding by writ of enquiry,⁵⁸ and he may still as before the interpleader acts apply to the court to enlarge the time for making his return. If he is unable to comply with the conditions entitling him to claim relief by interpleader, or when the case is obviously not one for interpleader, his proper course is to apply for an enlargement of the time to return the writ⁵⁹

Re-interpleader by sheriff.—A sheriff may re-interplead when a new claimant appears, and the issue will be amended, so that the new claimant may take part in the contest.⁶⁰

Disposition of the Courts.—The disposition of the courts, is now, to be more liberal in relieving the sheriff, than when the Interpleader Act was first enacted;⁶¹ although he must in numerous cases, not within the statute, take good advice and do the best he can.⁶²

One effect of Sheriff's Act.—It is worthy of note, that although the Interpleader Act was originally passed for the relief of sheriffs, it is now in a great measure used by creditors as a means of attacking conveyances or other transfers made by debtors to third parties. The creditor instructs a seizure, in the face of an adverse claim, and the sheriff interpleads as a matter of course. The third party, if out of possession of the property, is forced to be plaintiff in an issue; and whether in possession or out of possession, has to give security for what may turn out to be his own goods. This is often a hardship, because, being unable to give

⁵⁶ *Holmes v. Mentae* (1835), 4 Dowl. 300; 4 A. & E. 127; *Cox v. Balne* (1845), 2 D. & L. 718; *Isaac v. Spilsbury* (1833), 10 Bing. 93.

⁵⁷ *Rex v. Sheriff of Herefordshire* (1836), 5 Dowl. 144.

⁵⁸ *Barrett v. Butler* (1850), 2 Ir. Jur. O. S. 32.

⁵⁹ *Bentley v. Hook* (1834), 2 Dowl. 339; *Roach v. Wright* (1841), 8 M. & W. 157; *Mutton v. Young* (1847), 4 C. B. 371; *Holmes v. Mentae* (1835), 4 A. & E. 127; 4 Dowl. 300.

⁶⁰ *Bryce v. Kinnee* (1892), 14 Ont. Pr. 509.

⁶¹ *Darling v. Collatton* (1868), 10 Ont. Pr. 110; *Holt v. Frost* (1858), 3 H. & N. 821; 28 L. J. Ex. 55.

⁶² *Bateman v. Farnsworth* (1860), 29 L. J. Ex. 305.

security, and not desiring to have his goods sold, he will sometimes make a settlement although he has a good claim.

It has accordingly been held in Ontario, that an issue, directed on a sheriff's interpleader application between the claimant under a chattel mortgage from the debtor and the execution creditor, is a proceeding taken to impeach the mortgage under the Act respecting Assignments and Preferences by Insolvent Persons.⁶⁰

When goods not in possession of debtor.—In Ontario, if goods be in the possession of a third party claiming them, and not in the possession of the execution debtor, the sheriff is not obliged to seize, for the purpose of enabling an execution creditor to attack the claimant's title in an interpleader issue, unless he has first been furnished with instructions in writing, specifying the goods in such a way that they can be identified, nor until he has been furnished with a bond, with two sureties, conditioned that the parties executing it will be liable for the costs and expenses which the sheriff or claimant may be put to, by the seizure or subsequent dealings with the property.⁶¹

In a recent English case where the sheriff entered the premises of the claimant and took away the goods by force, the court refused in the interpleader order to stay the claimant's action for damages.⁷

Applicant must come to the court promptly.—A person seeking relief by interpleader must come to the court promptly, either, immediately before or after proceedings have been taken against him. He must not delay until a judgment or verdict has been obtained, for he will then be too late.⁶² Nor can he have relief, when by his own

⁶⁰ *Cole v. Porteous* (1892), 9 Ont. App. 111.

⁶¹ R. S. Ont. (1897) c. 77, s. 22.

⁶² *De Coppett v. Barnett* (1891), 21 T. L. R. 273.

⁷ *Cornish v. Tanner* (1827), 1 Y. & J. 333; *Yarborough v. Thompson* (1844), 3 Smed. & M. Miss. 291; *Union Bank v. Kerr* (1849), 2 Md. Chy. 460; *Fuller v. Patterson* (1869), 16 Grant. (Ont.) 91; *Crickmore v. Freeston* (1871), 40 L. J. Chy. 137; *New York v. Haws* (1873), 35 N. Y. Sup. Ct. 372; *Brown v. Wilson* (1876), 53 Ga. 534; *French v. Robrhard* (1877), 50 Vt. 43; *Moore v. Hill* (1877), 59 Ga. 760; *De Zouche v. Garrison* (1891), 140 Pa. St. 430; *Home Life Insurance Co. v. Caulk* (1897), 86 Md. 385; *Johnston*

laches he has permitted two claims for the same debt to ripen into separate judgments.⁶⁵ If it were otherwise an interpleader suit would become in effect an appeal from a judgment already recovered.⁶⁶

Reason for this rule.—The rule requiring diligence is well settled, both by reason and authority. Interpleader is afforded to protect a party from the annoyance and hazard of two or more actions touching the same property, or demand; but one, who, with a knowledge of all the facts, neglects to avail himself of the relief, or elects to take the chances for success in actions at law, ought to submit to the consequences of defeat. To permit an unsuccessful defendant, to compel the successful plaintiff to interplead, is to increase instead of to diminish the number of suits, to put upon the shoulders of others the burden which he asks should be taken from his own.⁶⁷

Where the action was confined to the mere quantum of the demand, a defendant after a verdict against him at law, was allowed to maintain a bill of interpleader.⁶⁸

A person who postponed making his motion for an interpleader order, from January until June, had his application denied;⁶⁹ while a debtor, who delayed for fifteen days was allowed relief, as it appeared that the rights of the claimants were not prejudiced by the delay.⁷⁰ A defendant, who had twice obtained time to plead, was allowed even then to interplead.⁷¹ Sometimes as a punishment for delay, the applicant will be required to pay the costs of the action against him, and be denied his costs

v. Oliver (1894), 36 N. E. Rep., Ohio, 458; but see *contra* Griggs v. Thompson (1843), 1 Ga. Dec. 146; Kistler v. Thompson (1895), 8 Lach. Jur. Pa. 241.

⁶⁵ Haseltine v. Brickey (1867), 16 Gratt. Va. 116; Cheever v. Hodgson (1881), 9 Mo. App. 565.

⁶⁶ Victoria v. Bethune (1877), 23 Grant, Ont., 563; 1 Ont. App. R. 398; Larabrie v. Brown (1857), 1 De G. & J. 204; but see Brennan v. Liverpool (1877), 12 Hun. N. Y. 62.

⁶⁷ McKinney v. Kuhn (1881), 50 Miss. 183.

⁶⁸ Hamilton v. Marks (1852), 5 De G. & Sm. 638.

⁶⁹ United States v. Bussey (1890), 27 N. Y. St. Rep. 183.

⁷⁰ Schmidt v. Douglas (1894), 14 Canada L. T. 515.

⁷¹ Barnes v. Bank of England (1838), 7 Dowl. 319.

of the interpleader application.⁷⁰ After an interpleader order has been made and acquiesced in, it is then too late to move to dismiss it, on the ground that it was filed too late.⁷¹

Exception to the rule.—In equity, however, a plaintiff is not bound to file his bill of interpleader, so long as a course of proceedings being taken by the different claimants is such, that if persevered in, will determine their respective rights, as between themselves, without the intervention of the Court of Chancery.⁷²

Delay as to one fund.—If interpleader be asked as to two funds, with respect to one of which the plaintiff is not entitled to relief on account of having delayed his application too long, that is no objection to his right to interplead as to the other.⁷³

Under Interpleader Statutes. — The English Act of 1831⁷⁴ provided, that the application should be made after declaration and before plea. The United States Code provisions use the same words, or words to the same effect, such as before answer, or before issue joined. It has been held in Ohio, that a defendant who has demurred is not too late.⁷⁵ The present English Rules, and others founded upon them, provide that a defendant may apply at any time after service of the writ of summons.⁷⁶ The general principle of diligence in interpleader requires, that the words '*at any time*,' be construed a reasonable time. In a recent decision it was said, 'it is well known in the law, that ever since the statute of William IV. the one object of the law has been to make interpleader proceedings prompt.'⁷⁷

It must of course be borne in mind, that when a stakeholder has been sued, the action may have proceeded a considerable distance before the second claimant appears.

⁷⁰ *Churchill v. Welsh* (1870), 47 Wls. 39.

⁷¹ *Cooper v. Jones* (1857), 24 Ga. 474.

⁷² *Steveking v. Behrens* (1837), 2 Myl. & Cr. 581.

⁷³ *Union Bank v. Kerr* (1849), 2 Md. Chy. 460.

⁷⁴ 1 & 2 Will. IV. c. 58, s. 1.

⁷⁵ *Cosad v. Shannon*, 3 Weekly Law Bulletin 965 (Ohio).

⁷⁶ English Order LVII., Rule 6; Ontario Rule 1108.

⁷⁷ *Macnair v. Andenshaw* (1891), 2 Q. B. 502; 65 L. T. R., p. 293.

Under such circumstances, it is impossible for the defendant to apply at an earlier stage, but he must do so promptly, as soon as he has notice of the second claim.

A bank sued for a deposit, the ownership of which was disputed, was held entitled to interplead, though an application by the plaintiff to restrain the payment of the fund to the other claimant during the pendency of the action had been denied, for such a denial is not conclusive of the validity of the plaintiffs' claim.⁷⁰

A defendant cannot take issue with the plaintiff, and at the same time have the benefit of an interpleader when a third party claims; the two are inconsistent, and he must elect between them, he cannot have both. In Ohio, by filing his answer, the defendant waives and abandons his interpleader, for the Code requires him to come before answer.⁷¹

Sheriff must come promptly. — A sheriff must not be guilty of delay in making his application,⁷² he should come promptly to the court after he has received notice of the adverse claim,⁷³ because his possession may cause great mischief, as by the absolute stoppage of a lawful trade.⁷⁴

When sheriff too late.—He will be refused relief if the application is not made until after the return day of the writ, unless the delay is satisfactorily explained.⁷⁵ He was refused where he delayed sixteen days and had exercised a discretion;⁷⁶ and also when the delay was sixty-three days, although he alleged that the delay was to enable him to seize the residue of the debtor's goods.⁷⁷ So, forty-seven days' delay, although partly accounted for, has been fatal;⁷⁸

⁷⁰ *Schweiger v. German Saving Bank* (1899), 57 N. Y. S. 356.

⁷¹ *Johnston v. Oliver* (1894), 51 Ohio St. 6.

⁷² *Macdonald v. Great N. W. Central Ry. Co.* (1894), 10 Man. 83.

⁷³ *Flynn v. Cooney* (1894), 18 Ont. Pr. 321; *Alexander v. Connell* (1848), 11 Ir. L. R. 325; *Wrixon v. Purcell* (1848), Bl. D. & O. 205; *Wright v. Bergin* (1848), Bl. D. & O. 284; *Good v. Briggs*, 5 Kulp Pa. 199.

⁷⁴ *Tufts v. Harding* (1850), 6 Jur. N. S. 110.

⁷⁵ *Cole v. McFaul* (1844), 1 U. C. Q. B. 270.

⁷⁶ *Adams v. Blackwell* (1884), 10 Ont. Pr. 163.

⁷⁷ *Miller v. Nolan* (1865), 1 U. C. L. J. 327; and see also *Harris v. York* (1892), 8 Man. 89; *Thompson v. Ward* (1835), 1 Ont. Pr. 240; *Boswell v. Pettigrew* (1878), 7 Ont. Pr. 393.

⁷⁸ *Cook v. Allen* (1838), 2 Dowl. 11; 1 C. & M. 542.

also three months' delay;⁸⁷ and also, where one term had passed in which the application might have been made.⁸⁸

Where notice of a claim was given to a sheriff, two months after the writ had been delivered to him for execution, it was held, that as his difficulty arose entirely from his own delay, in not making a levy when he might have done so, that he was not entitled to relief.⁸⁹ A sheriff who delays his application, at the request and for the interest of one of the parties, places himself out of the protection of the court.⁹⁰ Where an execution creditor obtained an attachment against a sheriff, for not returning the writ, the sheriff was only allowed to interplead on condition of his paying the costs of the attachment.⁹¹

When sheriff excused.—In general, when a sheriff is guilty of great delay, the onus is on him to show as far as he can be presumed to know the facts, that no loss has been occasioned by his acts or neglect. Sometimes, it may be necessary to refuse an interpleader application, in order to insure promptness on the part of sheriffs. On the other hand, the modern tendency is more in favour of such applications, than it was when the statutes first authorized them. The jurisdiction should be construed liberally, so far as consistent with the real interests of the parties concerned. A sheriff may be guilty of delay, and still be blameless of any dishonest or improper conduct, and if the parties have not suffered through his delay, the sheriff is entitled to be relieved from vexatious actions.⁹² The sheriff will therefore be entitled to relief, if he can satisfactorily explain his delay, or show special circumstances which have occasioned it. Thus, where much correspondence took place between the parties, the sheriff was allowed to interplead, although his application was made two

⁸⁷ *Devereux v. John* (1833), 1 Dowl. 548.

⁸⁸ *Ridgeway v. Fisher* (1835), 3 Dowl. 567; *Beale v. Overton* (1837), 5 Dowl. 599; 2 M. & W. 534.

⁸⁹ *Lashman v. Olaringbold* (1836), 2 H. & W. 87; *Ramaden v. Conry* (1839), 2 Ir. L. R. 175.

⁹⁰ *Mutton v. Young* (1847), 4 C. B. 371; 16 L. J. C. P. 300; see also *Skipper v. Lane* (1834), 2 Dowl. 784.

⁹¹ *Alemore v. Adeane* (1835), 3 Dowl. 408.

⁹² *Macdonald v. Great N. W. Central Ry. Co.* (1894), 10 Man. 83.

months and six days after he had received notice of the claim, but it was on condition that he should pay the costs of an action which had been commenced against him.²² In another case, where several months had elapsed before the sheriff's application, he was held not too late, as it appeared that negotiations had been going on between the parties, with a view to an arrangement.²⁴ So, where he fairly accounted for a delay of thirty-three days, by showing that he expected the other parties to initiate the necessary proceedings, it was held, that as the delay was not unreasonable, and no trial had been lost, he was entitled to his order.²⁵

Where a sheriff delayed his application, to make inquiries in respect of a second claim, he was held not too late,²⁶ because he is entitled to a reasonable time to inquire before coming to the court;²⁷ and where, after seizing, he had received notice of an intended claim, which would have rendered it unsafe for him to sell, he was held not too late after more than three months' delay.²⁸

Where notice had been sent to a sheriff with a writ, that a claim to the goods might be made, and that if made, it would be contested, it was held that the sheriff was not bound to take interpleader proceedings immediately the claim was made, without further instructions.²⁹

Affidavit explaining delay.—If the sheriff rely on any special circumstances, as excusing his delay, or for any other purpose, he must make a special affidavit of the facts on which he relies; and if he do not, a supplemental affidavit will not be allowed.¹

When claim before execution.—If a claim is made before the sheriff receive the execution, and the sheriff delay in seizing, and then interplead, his application will be refused.²

²² *Booth v. Preston* (1860), 3 Ont. Pr. 90.

²³ *Dixon v. Busell* (1834), 2 Dowl. 621.

²⁴ *Darling v. Collatton* (1833), 10 Ont. Pr. 110.

²⁵ *Toulmin v. Edwards* (1837), 1 Will., Woll. & Dav. 579.

²⁶ *Wilkins v. Peatman* (1877), 7 Ont. Pr. 84.

²⁷ *Barker v. Phipson* (1835), 2 Dowl. 621.

²⁸ *McGee v. Anderson* (1880), 6 Victorian L. R. 414.

²⁹ *Cook v. Allen* (1833), 2 Dowl. 11; *Wrigby v. Bergin* (1846), Bl. D. & O. 284.

¹ *Freeman v. Mountcashel* (1840), 12 Ir. L. R. 553.

Affidavit of no collusion in equity.—In every case of a bill of interpleader, the court, in order to prevent its being made the instrument of delay, or of collusion with one of the defendants, as where a defendant might for some reason prefer to have his claim passed upon by a court of equity rather than by a court of law, requires that an affidavit shall be made by the plaintiff, and be annexed to the bill, that there is no collusion between him and any of the defendants.³ The practice requiring this is a very old one, and in New Jersey it has been said that the affidavit is not a statutory requisite, nor is it required by any standing rule of court.⁴

Under Interpleader Acts.—Adopting the equitable practice the English Act of 1831 required the applicant to show by affidavit or otherwise, that he did not in any manner collude with the third party. The present English, Canadian and Australian Rules provide, that the applicant must satisfy the court by affidavit or otherwise that he does not collude with any of the claimants,⁵ and similar words are found in all the American State Codes.⁶

In Oregon, it has been suggested, that it is perhaps sufficient, if the facts showing that there has been no collusion, appear by appropriate allegations in the plaintiff's complaint;⁷ while in Connecticut no affidavit negating collusion is required.⁸

Meaning of collusion.—Collusion does not necessarily

³ *Errington v. The Attorney-General* (1781), 1 Bunb. 303; *Metcalf v. Hervey* (1749), 1 Ves. Sen. 248; *Warrington v. Wheatstone* (1821), 1 Jacob. p. 205; *Shaw v. Chester* (1834), 2 Ed. Ch. N. Y. 405; *Shaw v. Coster* (1840), 8 Paige N. Y. 339; *Mount Holly v. Ferree* (1864), 17 N. J. Eq. 117; *Tyus v. Rust* (1868), 37 Ga. 574; *Starling v. Brown* (1870), 7 Bush Ky. 164; *Van Winkle v. Owen* (1896), 54 N. J. Eq. 253; *Snodgrass v. Butler* (1876), 54 Miss. 45; *Whitney v. Cowan* (1878), 55 Miss. 626; *Blue v. Watson* (1882), 59 Miss. 619; *Ammendale v. Anderson* (1889), 71 Md. 128.

⁴ *Van Winkle v. Owen* (1896), 54 N. J. Eq. 253.

⁵ Order LVII., 1868, Rule 2; Ontario Rule 1104.

⁶ See Appendix.

⁷ *North Pacific Lumber Co. v. Lang* (1895), 42 Pac. Rep. 700 Or.

⁸ *Nash v. Smith* (1827), 6 Conn. 421; *Connociated v. Staples* (1865), 23 Conn. 544. See also *Vyryan v. Vyryan* (1801), 30 Beav. 65.

entail anything morally wrong, nor need the word be applied in an offensive sense, although it has acquired a meaning generally associated with something morally wrong. Giving an indemnity is not morally wrong, but such an act has been held equivalent to collusion. If the applicant has bound himself with one claimant to defeat the claim of the other, this can be nothing but colluding. The term means, literally, playing the same game. The stakeholder must be impartial.*

But collusion, to which the applicant himself is not a party, is no ground for refusing relief, as where there had been collusion between the party to whose rights the applicant succeeded and one of the claimants.¹⁰

Impartiality must continue.—The position of a person seeking relief from conflicting claims, must be one of continuous impartiality.¹¹ He must be, at the time he comes to the court, and must continue to be entirely indifferent between the conflicting claimants.¹²

Examples of collusion.—A party cannot be relieved, when he has deliberately chosen his side in the dispute, and has knowingly cast in his lot with one of the claimants; as, where a common carrier, holding goods for one person, at his request marked them as being sold to a third party, and afterwards recognized the first person as being still the owner, and gave him a shipping bill.¹³ It cannot be allowed, that any person, whether he be officer or private citizen, may choose whom he will pay and secure protection.¹⁴

When the applicant has made an agreement with one of the contending parties, to assist him in his endeavour to defeat the claim of the other, he has so far identified himself with the first party as to be guilty of collusion.¹⁵

* *Murietta v. South American Co.* (1893), 5 Reports 380; *Belcher v. Smith* (1832), 9 Bing. 82.

¹⁰ *Wehle v. Bowery Savings Bank* (1875), 8 J. & Sp. N. Y. 97.

¹¹ *Kerr v. Union Bank* (1862), 18 Md. 396.

¹² *McFadden v. Swinerton* (1900), 59 Pac. (Oregon) 816.

¹³ *Brill v. Grand Trunk* (1869), 20 U. C. C. P. 9.

¹⁴ *McDuffee v. Collins* (1897), 117 Ala. 487.

¹⁵ *Murietta v. South American Co.* (1893), 5 R. 380.

A sheriff, who gives part of the goods seized to the claimant, colludes with such person, and cannot have relief by way of interpleader.¹⁰ If it appear, that a sheriff has been acting throughout in the interests of the execution creditor, and against the interest of the claimant, his application will be refused.¹⁷

Where money was claimed from a partnership by a widow, and also by her husband's administrators, and it appeared that one of the administrators was also a member of the partnership, it was held, that on account of the double relation, the firm could not interplead, as the person who was partner and administrator could scarcely make oath, that in one capacity he was not in collusion with himself in the other.¹⁸

No solicitor or counsel, for the plaintiff to a bill, can appear, or be heard, or be allowed to act for or on behalf of any or either of the defendants.¹⁹

The applicant must swear, that he does not collude with either of the claimants, and his affidavit will be defective, if he denies collusion with only one.²⁰

Form of affidavit.—It is not necessary, that the affidavit should be actually annexed by sealing, tying, or other mechanical means to the bill, it is sufficient that it is filed and a copy served with the bill.²¹ It is no objection to a bill, that the affidavit of no collusion is sworn before the bill is filed, the general practice is to swear it the day before.²² Nor is it necessary, that the plaintiff should swear that the bill is filed at his own expense, because in certain cases, another may bear the costs of suit without being a maintainer, as a father furnishing the expenses of a suit on a bill by his son.²³

¹⁰ *Braine v. Hunt* (1834), 2 Dowl. 391.

¹⁷ *Flynn v. Cooney* (1899), 18 Ont. Pr. 321.

¹⁸ *Jackson v. Jackson* (1887), 84 Ala. 348.

¹⁹ *Houghton v. Kendall* (1868), 7 Allen Mass. 72; Mass. Rule of 1844, 186 Mass. 607.

²⁰ *McDonald v. McKenzie* (1888), 20 Nova Scotia 527.

²¹ *Shepherd v. Jones* (1861), 3 De G. F. & J. 56.

²² *Walker v. Fletcher* (1842), 1 Phil. 115.

²³ *Metcalf v. Hervey* (1749), 1 Ves. Sen. 248.

By whom affidavit made.—As a general rule, the affidavit denying collusion must be made by the person himself, who is seeking relief, so that an affidavit by his solicitor is not sufficient;²⁴ but where a plaintiff was abroad, and the case pressing, an affidavit of no collusion by his solicitor was allowed.²⁵ So, where a plaintiff was ill, a joint affidavit by his son a partner in his business, and by his solicitor, deposing to his state of health, and that there was no collusion between them or the plaintiff and the defendants, was allowed to be filed with the bill.²⁶ And where there were several plaintiffs, residing in different parts of the country, who had contracted their business through the same agent in London, the court allowed a bill to be filed upon an affidavit of no collusion by such agent, but did not grant the ordinary injunction to the hearing, but merely an interim order for a reasonable time, upon an understanding that the plaintiffs would themselves make the requisite affidavit.²⁷

Generally, all the plaintiffs must make affidavits, unless some satisfactory reason be given why all cannot join,²⁸ but an affidavit made by two plaintiffs out of four, was held sufficient, where the four were partners;²⁹ and by one out of two under similar circumstances.³⁰

A corporation cannot make an affidavit, it must be made by some person acquainted with the facts, the affidavit may be made by the company's solicitor if he can swear positively, it need not necessarily be made by the secretary.³¹ An officer of a corporation making the affidavit must depose, that to the best of his knowledge and belief the company does not collude, it is not sufficient for him to say that he does not collude.³²

²⁴ Wood v. Lyne (1850), 4 De G. & Sm. 16.

²⁵ Larabrie v. Brown (1857), 1 De G. & J. 204.

²⁶ Hartley v. Swayne (1860), Dan. Chy. Pr., 4th Amer. Ed., 1503.

²⁷ Nelson v. Barter (1864), 3 Hem. & M. 334.

²⁸ Gibbs v. Gibbs (1857), 5 W. R. 243.

²⁹ Glover v. Reynolds (1867), 16 L. T. N. S. 84.

³⁰ Bliss v. French (1898), 70 N. W. Rep. 73, Mich.

³¹ Great Southern & Western Ry. v. Corry (1867), Ir. R. 1 Eq.

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³² Bignold v. Audland (1840), 11 Sim. 23.

Affidavit of sheriff.—The English Interpleader Act of 1831 did not provide that a sheriff should negative collusion as was required by a stakeholder. It was accordingly held, that a sheriff in applying for relief under the Act, need not deny collusion;³³ but it was pointed out, that he must not consider that he was at liberty to collude with the claimant.³⁴ In Upper Canada, under a statute in the same words as the English Act,³⁵ the sheriff was required to swear that he did not in any manner collude with the claimant, or with the plaintiff in the execution.³⁶

The present English and Canadian Rules³⁷ require the sheriff to satisfy the court by affidavit or otherwise, that he does not collude with any of the claimants. It has been held in England, that the sheriff need not as a general rule file an affidavit.³⁸

If an indemnity has been taken.—After the English Interpleader Act of 1831 became law the question arose, whether a stakeholder was obliged to apply for an indemnity, before seeking the protection afforded by this new statute. It was decided, that a stakeholder was not bound to apply for an indemnity, nor was he obliged to accept one if offered, although the claimant offering it should have an apparent title.³⁹ But if a defendant had taken an indemnity, and thus identified himself with one of the claimants, he could not then obtain relief under the Act.⁴⁰

The rule was the same in equity, and a plaintiff who had taken a security by way of indemnity from one of the defendants, instead of resting upon the indemnity of the court, could not maintain his bill of interpleader.⁴¹

The same questions arose with regard to interpleader by sheriffs. It was decided that this officer might have the

³³ *Doppelger v. Hinxman* (1833), 2 Dowl. 424; *Dobbins v. Green* (1834), 3 Dowl. 509; *Bond v. Woodhall* (1835), 4 Dowl. 351.

³⁴ *Roberts v. Asken* (1848), 12 Jur. 440.

³⁵ 7 Vict. c. 30, s. 6.

³⁶ *Whittier v. Whittier* (1857), 3 U. C. L. J. O. S. 18 & 28.

³⁷ English Order LVII., Rule 2 (b); Ont. Rule 1104.

³⁸ *Stucker v. Heggerty* (1892), 37 L. T. 27.

³⁹ *Gladstone v. White* (1836), 1 Hodges 380; *East and West India Co. v. Littledate* (1848), 7 Hare 57.

⁴⁰ *Tucker v. Morris* (1882), 1 Or. & M. 73.

⁴¹ *Statham v. Hall* (1892), 1 Turner & R. 30.

remedy although he had not applied for an indemnity,⁴³ or although he had been offered one and had refused it;⁴³ but a sheriff who takes a bond of indemnity waives his right to relief.⁴⁴

A sheriff cannot be obliged by a claimant to take the benefit of the Act, even though such claimant offer to indemnify the sheriff, if he will not sell under the execution.⁴⁵

The objection that a stakeholder has, by taking an indemnity from one of two rival claimants to property in his hands, disentitled himself to relief under the Interpleader Acts, because he has identified himself with one, and must be taken to collude with the claimant who gave the indemnity, cannot be raised by that claimant.⁴⁶

Rebutting affidavit.—It is a rule in equity, that the plaintiff's affidavit of no collusion in an interpleader suit cannot be rebutted before the hearing, by a counter affidavit, and the plaintiff is entitled notwithstanding a counter affidavit may be filed, to the usual order for an injunction, and for payment into court.⁴⁷ If collusion is alleged, the court will put the plaintiff upon an undertaking as to damages.⁴⁸ In one instance, where the affidavit was not in regular form, the court, on suspicion of collusion, directed an inquiry into the circumstances, and the report confirming the fraud, the bill was dismissed with costs.⁴⁹

The defendants may raise an issue, as to the plaintiff's averment that he is a disinterested stakeholder, and such issue will be tried, and the plaintiff may at the hearing be refused relief.⁵⁰

⁴³ *Crossley v. Ebers* (1835), 1 H. & W. 216; but see *Wills v. Popjoy* (1835), 10 Leg. Obs. 12.

⁴⁴ *Levy v. Champneys* (1834), 2 Dowl. 454.

⁴⁵ *Ostler v. Bower* (1836), 4 Dowl. 605; *Re Corbett* (1851), 8 U. C. Q. B., p. 131; *Adams v. Blackwell* (1884), 10 Ont. Pr. 168.

⁴⁶ *Harrison v. Forster* (1836), 4 Dowl. 558.

⁴⁷ *Thompson v. Wright* (1884), 13 C. B. D. 632.

⁴⁸ *Langston v. Boylston* (1793), 2 Ves. Jun. 101; *Stevenson v. Anderson* (1814), 2 Ves. & B. 410; *Manby v. Robinson* (1869), L. R. 4 Chy. App. 347.

⁴⁹ *Manby v. Robinson* (1869), L. R. 4 Chy. App. 347.

⁵⁰ *Dungey v. Angove* (1789), 2 Ves. Jun. 308.

⁵¹ *Williams v. Matthews* (1890), 47 N. J. Eq. 191.

After an action had been commenced to recover the amount of a reward leading to an arrest and conviction, a clerk, still in the employ of the defendants made claim, and thereupon the defendants sought to interplead. It was held, that the court had jurisdiction to refuse relief, notwithstanding the affidavit of no collusion, and might come to the conclusion that there had been collusion.⁵¹

When no affidavit is filed.—The want of an affidavit denying collusion is a ground of demurrer, and may be also taken advantage of by a defendant at the hearing.⁵² The plaintiff is not required, on his motion for an injunction, to file an affidavit verifying the statements in his bill, the affidavit denying collusion is the only one required.⁵³ If no affidavit is filed, the defect cannot be remedied on appeal, by depositions taken showing that an agent of the plaintiff appeared in the court below, and there made such an affidavit. The only way to correct such an error, is to obtain leave to amend the bill, and leave being granted, the amendment can be made, either by filing a new bill with the necessary affidavit, or by filing an affidavit, either annexed to the original bill, or separate yet a part of it.⁵⁴ If the defendants do not object to the fact that the usual affidavit of no collusion is not attached to the bill of interpleader, it has been held that the court is not bound to take notice of the fact.⁵⁵ In Massachusetts it has been held, that by going to a hearing upon the merits, the claimants waive formal and technical objections, which should be taken by demurrer, as that no affidavit of no collusion is annexed.⁵⁶

Sheriff interested through under-sheriff.—In England, the sheriff has in some cases been refused relief, because

⁵¹ *Burritt v. Press Publishing Co.* (1898), 25 App. Div. 141 N. Y.

⁵² *Blue v. Watson* (1882), 50 Miss. 619; *Mount Holly v. Ferree* (1864), 17 N. J. Eq. 117; *Home Life Ins. Co. of N. Y. v. Caulk* (1897), 86 Md. 385.

⁵³ *Walbarke v. Sparks* (1827), 1 Sim. 385; *Fry v. Watson* (1829), 7 L. J. Chy. 175; *Meredith v. Molloy* (1841), Fl. & K. 195.

⁵⁴ *Home Life Ins. Co.'y of N. Y. v. Caulk* (1897), 86 Md. 385.

⁵⁵ *Biggs v. Kouns* (1838), 7 Dana Ky. 405.

⁵⁶ *Cobb v. Rice* (1881), 130 Mass. 281.

of alleged improprieties between the under-sheriff and one of the parties. Where the claimant's solicitor persuaded the under-sheriff, who was his partner, to delay executing the writ, by which the execution of the writ was defeated, interpleader was refused. It was said the sheriff ought to have no interest on either side.⁸⁷ Relief was also refused where the under-sheriff was the execution creditor, and also where he was the partner in business of the execution creditor.⁸⁸

Afterwards the court became more liberal to the sheriff, and it was pointed out in 1858, that there were some old cases in which greater strictness prevailed, where the sheriff's application was defeated, under circumstances in which the court would not refuse to assist him at the present day. It was held, that the mere fact that the under-sheriff was attorney for the claimant at the time of the seizure, and prepared and caused to be served on himself, as under-sheriff, a notice of claim on behalf of such claimant, should not disentitle the sheriff to relief where the parties had not been prejudiced.⁸⁹ It has been held in Ontario, that it does not make any difference, that the claimant is an officer in the employ of the sheriff.⁹⁰

Subject must come properly to his hands.—A person asking relief by interpleader, must show how the property in question came to his hands, so that the court may see that his relation to the subject-matter is such as to entitle him to the relief sought. As that it came to him in escrow, to be delivered in accordance with the terms of an option. It is not enough, to say simply, that the property came into his hands, as that may be consistent with a tortious possession.⁹¹ A party therefore, who has wrongfully possessed himself of the subject-matter, the court will not

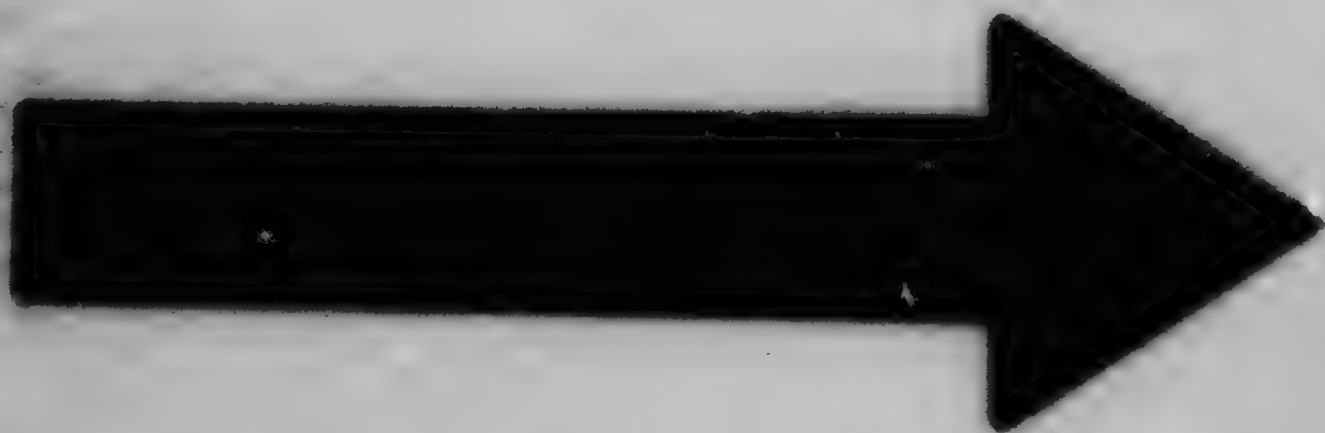
⁸⁷ Duddin v. Long (1834), 3 Dowl. 130; Cox v. Balne (1845), 2 D. & L. 718; 14 L. J. Q. B. 95.

⁸⁸ Ostler v. Bower (1836), 4 Dowl. 605.

⁸⁹ Holt v. Frost (1858), 3 H. & N. 821.

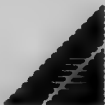
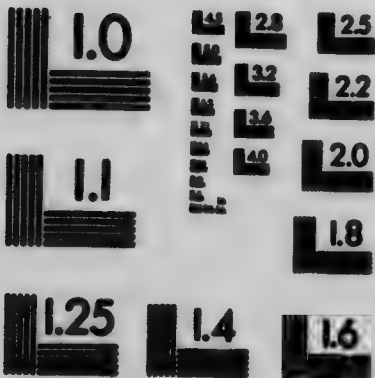
⁹⁰ Darling v. Collatton (1883), 10 Ont. Pr. 110.

⁹¹ Stone v. Reed (1890), 152 Mass. 179; Walker v. Bamberger (1896), 17 Utah 239.



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assist, by requiring the claimants to interplead in regard to a state of facts brought about by his own misconduct.⁶² It does not matter, however, that the claimants have accumulated the fund in question in a manner not approved of by the court.⁶³

Where a sheriff seized goods in the possession of a receiver, appointed in an action in the Exchequer Court of Canada to enforce a mortgage of a ship, he was refused interpleader, when both the mortgagee and the execution creditor claimed.⁶⁴

If a wrongdoer to either claimant.—It is a rule that interpleader cannot be maintained, when the applicant is obliged to admit, or it appears that as to either of the claimants he is a wrongdoer, he must be an innocent stakeholder.⁶⁵ It is this rule which precludes a sheriff in equity from making a case proper for relief, because, as a general thing, he takes the property in execution, knowing that it is claimed by a third party.⁶⁶ The applicant is also a wrongdoer if, before the appearance of the second claimant, he resists the claim of the first claimant, and asserts a superior title as against him.⁶⁷

Where a statute provides that the courts are to recognize and take notice of all equitable titles and rights, it has been held that this extends to interpleader, and the court will prevent a person seeking interpleader from acting unjustly by refusing him relief.⁶⁸

If he has caused his own difficulty.—It follows therefore, that when, from any act of omission or commission,

⁶² *Hatfield v. McWhorter* (1869), 40 Ga. 269; but see *Field v. Early* (1897), 167 Mass. 449.

⁶³ *Gilmore v. Devellin* (1880), 4 Mac. A. 306 D. C.

⁶⁴ *Williamson v. Bank of Montreal* (1899), 6 British Columbia 486.

⁶⁵ *Coleman v. Chambers* (1900), 29 So. Reps. 58 Ala.

⁶⁶ *Slingsley v. Boulton* (1813), 1 Ves. & Ben. 334; *Quinn v. Green* (1840), 1 Ired. Eq. N. C. 220; *Shaw v. Coster* (1840), 8 Paige N. Y. 339; *Crane v. Burntrager* (1848), 1 Carter Ind. 165; *Mount Holly v. Ferree* (1864), 17 N. J. Eq. 117.

⁶⁷ *New York & Harlem Ry. Co. v. Haws* (1873), 35 N. Y. Sup. Ct. 372.

⁶⁸ *Haddow v. Morton* (1894), 1 Q. B. 95 and 565; 63 L. J. Q. B., p. 40.

the person seeking relief has placed himself in his own difficulty, interpleader will not lie.⁶⁹ He must show, that it is not by any erroneous or wrongful act of his own that the double or conflicting claims have arisen.⁷⁰ On this ground relief was refused to a purchaser of goods, who accepted a bill of exchange and sent it through the post to his vendor in payment, with a blank for the drawer's name, the vendor claiming the price of his goods, and a third party payment of the bill which had come to him in due course;⁷¹ so, a person liable for payment of material and labour, was refused relief, because he did not know with which of the claimants he had contracted;⁷² while a bank was refused interpleader, when it could not say, whether a customer had made his deposit before or after an attaching order had been served, the money being also claimed by a holder of the customer's cheque.⁷³

A person sued for detaining property, which he has taken under his control for the protection of the right of a supposed owner, cannot maintain an action to require the person from whom he took the property, and such supposed owner to interplead respecting it;⁷⁴ nor, can a person who, in good faith but from wrong information, has replevied property which does not belong to him, when it is claimed by two different parties;⁷⁵ and so, a person who has agreed to hold for a sheriff, certain property levied upon by that officer, and has given the sheriff a receipt therefor, cannot call upon the sheriff to interplead with a third party also claiming the same property.⁷⁶ A sheriff cannot interplead, when he has seized the same goods under executions placed in his hands by different plaintiffs, against different execution debtors.⁷⁷

⁶⁹ *Horner v. Wilcocks* (1849), 1 Ir. Jur. O. S. 136.

⁷⁰ *Emerick v. New York Life* (1878), 49 Md. 352.

⁷¹ *Farr v. Ward* (1837), 2 M. & W. 844.

⁷² *Turner v. Kendal* (1844), 2 Dowl. & L. 197.

⁷³ *Mathot v. North River Bank* (1889), 16 Civ. Pro. N. Y. 314.

⁷⁴ *United States v. Victor* (1863), 16 Abb. N. Y. 153.

⁷⁵ *Fuller v. Patterson* (1869), 16 Grant, Ont., 91.

⁷⁶ *Cromwell v. American* (1890), 57 Hun. N. Y. 149.

⁷⁷ *Vaudyke v. Bennett*, 1 T. & H. Pr. Pa., sec. 1136.

No relief if liable to both claimants. — If the circumstances of the case show that the person seeking relief is liable to both claimants, that is no case for interpleader. It is of the essence of an interpleader suit, that the applicant shall be liable to only one of the claimants. The office of an interpleader is not to protect a party against a double liability, but against double vexation in respect of one liability.⁷⁷ When the claims constitute two liabilities, it is not a double demand for one duty,⁷⁸ and the applicant must make his own defence against each claimant, without help from the other.⁷⁹

Examples of rule.—For this reason, a navigation company, whose captain signs two bills of lading, cannot call on the two holders to interplead;⁸⁰ nor can a tenant have relief when he has voluntarily taken an independent lease from each of two adverse claimants to real estate, and is asked by both to pay the rent.⁸¹ So, where a railway company issued a scrip certificate to one claimant, and under a forged power of attorney issued the same stock to the other claimant, relief was refused when both claimed the dividends;⁸² and in the same way, where a certificate of stock was issued in place of one which had been lost, interpleader was not granted, when claims were made under both.⁸³ A vendor of property, who has committed himself incautiously with two estate agents, cannot interplead when both claim the commission.⁸⁴ A life insurance company, issuing two policies on the same life has exposed itself to claims under both, and must meet them as best it may,⁸⁵ but interpleader has been allowed to a fraternal order, where a second certificate issued to the same member was conditioned that it

⁷⁷ *Crawford v. Fisher* (1840), 1 Hare 436; *Farr v. Ward* (1837), 2 M. & W. 844; *Morgan v. Fillmore* (1864), 18 Abb. Pr. N. Y. 217.

⁷⁸ *Cochrane v. O'Brien* (1845), 8 Ir. Eq. R. 241.

⁷⁹ *Ryan v. Lamson* (1894), 44 Ill. App. 204.

⁸⁰ *McGaw v. Adams* (1857), 14 How. Pr. N. Y. 461; *Victor Söhne v. British W. N.* (1888), 84.

⁸¹ *Standley v. Roberts* (1894), 59 Fed. Rep. Ind. T. 836.

⁸² *Dalton v. Midland* (1852), 12 C. B. 458.

⁸³ *Buffalo v. Alberger* (1860), 22 Hun. N. Y. 349.

⁸⁴ *Sachsel v. Farrar* (1889), 35 Ill. App. 277; but see *Brooke v. Smith*, 83 W. N. C. Pa. 74.

⁸⁵ *National v. Pingrey* (1886), 141 Mass. 411.

was to be binding only in case it was an effectual substitution for the first;⁵⁶ and also, where a husband took out a policy upon his own life in favour of his wife, and afterwards at his request the company substituted for that policy one payable to his legal representatives, and after his death claims were made by his wife and his executor.⁵⁷

Must not exercise a discretion.—The applicant is not entitled to call upon the adverse claimants to interplead, when he has already exercised a discretion in the matter. He may not, after notice from the claimants, attempt some interim disposition of the property, or seek to make some arrangement with the claimants, instead of promptly bringing the subject-matter into court, and seeking directions there.⁵⁸

Where a sheriff seized goods in execution, and sold them after a claim had been made by a third party, he was not allowed the full relief of an interpleader order, but the court added the execution creditor as a party defendant in the action which the claimant had brought against the sheriff.⁵⁹

An execution creditor and a claimant, having agreed with a sheriff, that he should sell and hold the proceeds until it should be decided between them which was entitled, and after the sale, two prior execution creditors also claiming, the sheriff was refused an interpleader order, because of the agreement which he had made.⁶⁰ But, where a sheriff sold with the consent of the only claimants an execution creditor and a third party, it was held that he had not improperly exercised his own discretion, and might interplead.⁶¹

A sheriff who threshed grain taken in execution, and sold part of it after notice of an adverse claim, was refused

⁵⁶ *Order of the Golden Cross v. Merrick* (1895), 163 Mass. 374.

⁵⁷ *Emerick v. New York Life* (1878), 49 Md. 352.

⁵⁸ *Crump v. Day* (1847), 4 C. B. 760; *Harris v. York* (1892), 8 Man. L. R. 89; *Victor v. Excelsior Hosiery Co.*, 10 C. C. Pa. 325.

⁵⁹ *Slowman v. Back* (1882), 3 B. & Ald. 108. See also *Lewis v. Protheroe* (1898), 17 Atl. Rep. Pa. 200; and *O'Neill v. O'Neill* (1853), 5 Ir. Jur. O. R. 183.

⁶⁰ *Boswell v. Pettigrew* (1878), 7 Ont. Pr. 393.

⁶¹ *Darling v. Collatton* (1883), 10 Ont. Pr. 110.

an interpleader order.⁸² And where a sheriff sold some goods, which he thought perishable, and delayed interpleading until he might seize others, his application was dismissed.⁸³

A sheriff, on going to seize, found the goods claimed by an assignee in insolvency and withdrew. The goods were sold by the assignee to a third party, and afterwards the petition in bankruptcy was dismissed. The sheriff then seized again, and upon the purchaser claiming, applied for an interpleader order, it was refused, upon the ground that he had already exercised a discretion in the matter.⁸⁴ So, a sheriff was refused relief when, upon going to make a levy, and a claim being made, he withdrew without making a seizure.⁸⁵

A sheriff cannot interplead when he allows any large portion of the goods to be taken out of his possession;⁸⁶ nor can he have relief, when he has paid part of the proceeds of a levy to the first execution creditor, and seeks to have a second execution creditor and the claimant interplead as to the balance.⁸⁷

Must stand indifferent. — The applicant may have no interest in the subject-matter, he must stand indifferent between the contending claimants. The assertion of perfect disinterestedness is an essential ingredient in the foundation of the right to interplead. He must be a mere stakeholder, having no interest in the controversy, and without any rights of his own to be litigated.⁸⁸

In one sense, it may be said, that the applicant has no interest when he lays claim to no specific part of the subject matter, but he does possess a very substantial interest

⁸² *Harris v. York* (1892), 8 Man. 89.

⁸³ *Miller v. Nolan* (1865), 1 U. C. L. J. 327.

⁸⁴ *Crump v. Day* (1840), 4 C. B. 760.

⁸⁵ *Holton v. Guntrip* (1837), 6 Dowl. 130.

⁸⁶ *Wheeler v. Murphy* (1854), 1 U. C. Pr. R. 336.

⁸⁷ *Adams v. Blackwell* (1884), 10 Ont. Pr. 168.

⁸⁸ *Shaw v. Coster* (1840), 8 Paige N. Y. 339; *New York v. Haws* (1873), 35 N. Y. Sup. Ct. 372; *Bridesburg Mfg. Co.'s Appeal* (1884), 106 Pa. St. 275; *Wells v. Miner* (1885), 25 Fed. Rep. Cal. 533; *Williams v. Matthews* (1890), 47 N. J. Eq. 196; *National v. Piatte* (1894), 54 Ill. App. 483; *Groves v. Sentell* (1894), 153 U. S., p. 485; *Browning v. Hillig* (1897), 60 Mo. App. 594.

in it, when, if one party succeeds, he will have to pay a certain sum, and if the other succeeds a sum very much less.²⁰ For this reason, interpleader was refused to the owner of land, when the tax collectors of two municipalities each claimed the right to collect taxes in respect of his property, the tax demanded by one being double that demanded by the other, and the owner being naturally interested in paying the lesser sum;²¹ but in another case, where the owner paid into court the highest of the two taxes, he was allowed to interplead.²²

In one case, the maker of a promissory note, upon whom a double demand had been made, was refused relief, upon the ground that it was a matter of interest to him to know to whom he should pay the note.²³ The principle of this decision is a very narrow one, and if followed would prevent relief in many cases proper for interpleader.

Where an insurance company cancelled a policy at the request of the assured, and issued it anew to other beneficiaries, and claims being afterwards presented upon both new and old policies, the company was held to have such an interest in the defeat of one of the claimants as to incapacitate it from maintaining interpleader.²⁴

After judgment has been obtained by one or more of the claimants against the stakeholder, it is impossible for the latter to occupy a position of strict neutrality between the parties, because he is then interested, either in setting aside the judgment, or in having the claim of the judgment holder established, so that he may be protected against the other party.²⁵

Where shares were claimed from a company by the owner, and by an assignee to whom they had been transferred by forged assignments, the company was refused

²⁰ *Murietta v. South American Co.* (1896), 5 R. (Eng.) 380.

²¹ *Greene v. Mumford* (1856), 4 Rd. Id. 313.

²² *Thomson v. Ebbets* (1824), 1 Hopk. N. Y. 272.

²³ *Newton v. Moody* (1839), 7 Dowl. 582.

²⁴ *Conley v. Alabama* (1890), 67 Ala. 472.

²⁵ *Home Life Insurance Co. v. Caulk* (1897), 86 Md. 385; but see *Fowler v. Lee* (1839), 10 G. & J. (Md.) 358.

interpleader, because it was not the holder of shares in which it had no interest, for it had cancelled the owner's certificate and issued a new one to the other claimant wrongfully and without authority.⁶

Where a trustee for creditors under an assignment, was subjected to double claims, in which some of the claimants sought to set aside the assignment as fraudulent, it was held that the trustee was not an indifferent stakeholder, because if the assignment were sustained, he would be entitled to a commission on \$300,000.⁷

It is no objection, that the person interpleading has an interest in the success of one claimant, when such success will increase his own chance of success in a prospective suit with regard to a different subject matter.⁸

Where the plaintiff in a bill of interpleader had been arrested by one of the claimants before he could interplead, it was held, that he ought not, as a condition of being relieved, to be put upon terms not to bring any action.⁹

Where a plaintiff in an interpleader suit had previously set up a claim of lien, and had pleaded it in defence to an action at law, it was held, that this was no bar to an interpleader order being made, on the terms that the plaintiff should withdraw his plea and pay the costs at law and in equity up to the time of such withdrawal.¹⁰ The fact that one claim was denied in a previous suit, does not bring it within the rule.¹¹

Where a special administrator had been ordered to pay a fund in his hands to the general administrator, and appealed from the order, and pending the appeal he filed a bill of interpleader against the general administrator and a third party claiming the fund as belonging to the intestate's widow, it was held, that interpleader did not lie,

⁶ *The Chicago Edison Co. v. Fay* (1896), 164 Ill. 323.

⁷ *National Park Bank v. Lanahan* (1883), 60 Md. 477.

⁸ *Oppenheim v. Leo Wolf* (1846), 3 Sand. Chy. N. Y. 571.

⁹ *Langston v. Boylston* (1793), 2 Ves. Jun. 101.

¹⁰ *Jacobson v. Blackhuist* (1862), 2 J. & H. 493.

¹¹ *Orient v. Reed* (1889), 81 Cal. 145; but see *contra* *Brennan v. Liverpool* (1877), 12 Hun. N. Y. 62.

because the plaintiff had taken sides in the matter by his appeal.¹²

The fact that a plaintiff to a bill of interpleader refused, before any adverse claimant had appeared, to hand over goods to his bailor who was in prison until he might consult his solicitor, was held not to prejudice his right to maintain a bill after an adversary claimant had appeared.¹³

An applicant who has placed himself in the position in which he stands, at the request, and with a view to the interest of one of the claimants, cannot have relief.¹⁴ When a custodian of a fund has entered into an arrangement by which he has agreed to keep part of the fund, and to pay the balance to one claimant, he has deprived himself of the status of an independent stakeholder, and cannot interplead.¹⁵ It has also been held, that a debtor who has admitted the claim of one of the claimants, cannot be said to stand indifferent between them.¹⁶ In England, however, relief will lie, although the applicant has admitted the claim of one of the parties, or although he has issued a document of title to one of the claimants.¹⁷

Where money was placed in the applicant's hands, to be paid over, after he had taken certain accounts, to a third party, and being sued before the accounts were taken, it was held that he could not interplead, because, it was said, he had a duty to perform to both parties, and until it was performed he could not be said to stand indifferent between them.¹⁸ Under very similar circumstances, a plaintiff was allowed to maintain a bill of interpleader, where one of the parties died before the accounts were adjusted, and his administrator claimed.¹⁹

¹² *Atkinson v. Flannigan* (1888), 70 Mich. 639; 38 N. W. Rep. 655.

¹³ *Langston v. Boylston* (1793), 2 Ves. Jun. 101.

¹⁴ *Belcher v. Smith* (1832), 9 Bing. 82.

¹⁵ *Ludlow v. Strong* (1895), 31 Atl. Rep. N. J. 409.

¹⁶ *Mitchell v. Northwestern* (1887), 26 Ill. App. 295.

¹⁷ *Attenborough v. London and St. Katharine's Dock Co.* (1878), 3 C. P. D. 450.

¹⁸ *Cotton v. Cameron* (1855), 2 Ont. Pr. 62.

¹⁹ *Hackett v. Webb* (1676), Rep. Temp. Finch 257.

A corporation may maintain interpleader, when a dividend due on its capital stock is claimed adversely, and it is no objection that the company improperly allowed a transfer of the stock, because that question does not affect the right of property in the dividend.²⁰

Must assert no claim.—The applicant himself, cannot claim any part of, or any interest in the subject-matter as to which he seeks relief by way of interpleader.²¹ He must disclaim all interest in the subject in his hands,²² and it has therefore been held, that the recitals in a bill of interpleader should give so full a statement of the plaintiff's case as to demonstrate that he has no interest in the thing in controversy.²³ Interpleader will therefore be refused, when the person invoking the aid of the court asserts any interest in or claim upon the subject of the litigation,²⁴ which either of the claimants contest.²⁵ He is not then a stakeholder, indifferent as to which claimant shall be awarded the fund.²⁶

Where the beneficiary of an estate collected certain insurance moneys for the executor, and the executor and other beneficiaries both claimed the fund, it was held that the applicant had himself an interest, which was a bar to his bill of interpleader.²⁷ And so, where the plaintiff in a bill of interpleader was an assignee in insolvency, who was himself a claimant of the fund in his own possession, the court refused to award relief.²⁷

²⁰ *Salisbury v. Townsend* (1871), 100 Mass. 115.

²¹ *Shaw v. Coster* (1840), 8 Paige N. Y. 339; *Cobb v. Rice* (1881), 130 Mass. 231; *Cogswell v. Armstrong* (1875), 77 Ill. 139; *Wells v. Miner* (1885), 25 Fed. Rep. Cal. 533; *National v. Platte* (1894), 54 Ill. App. 483; *McFadden v. Swinerton* (1900), 59 Pac. 816 (Oregon).

²² *New York v. Haws* (1873), 35 N. Y. Sup. Ct. 372; *Bridenburg Mfg. Co.'s Appeal* (1884), 106 Pa. St. 275; *Groves v. Sentell* (1894), 153 U. S., p. 485.

²³ *Williams v. Matthews* (1890), 47 N. J. Eq. 196.

²⁴ *Whitney v. Cowan* (1878), 55 Miss. 626; *Long v. Barker* (1877), 85 Ill. 431.

²⁵ *Oppenheim v. Leo Wolf* (1846), 3 Sand. Chy. N. Y. 571.

²⁶ *Brackett v. Graves* (1896), 30 App. Div. N. Y. 162.

²⁷ *Whitbeck v. Whiting* (1895), 59 Ill. App. 520.

²⁸ *Castner v. Twitchell Champlain Co.* (1898), 91 Me. 524.

An applicant having collected a note placed in his hands for the purpose of being credited on a debt owing to him by the person who gave him the note, upon another party claiming the proceeds, sought to interplead the depositor of the note and such claimant, but it was held that he had such an interest in the proceeds, that he could not maintain his bill.²⁰

Rule in Scotland.—In Scotland, where one of the claimants can raise the process of multiplepoinding in the name of the debtor, the proceeding will lie, although the nominal raiser who owes the debt disputes that any debt is owing.²¹

English Act of 1831.—Following the equitable principle the English Interpleader Act of 1831 required the defendant to show by affidavit or otherwise that he did not claim any interest in the subject-matter of the suit.

Claim for commission, freight, etc.—It was this rule which prevented relief from being awarded to an auctioneer claiming to deduct his commission,²² to a warehouseman claiming a lien for his storage,²¹ a wharfinger his charges,²³ a common carrier his lien for freight,²³ or an attorney claiming to deduct his costs of recovering the fund in his hands.²⁴ It was pointed out, that in these cases, the applicant had a personal question to maintain with one or both of the adverse claimants, which prevented him from obtaining relief upon the principle of interpleader.²⁵

The rule relaxed.—Under the English Act, however, the equitable rule became relaxed. It was argued, that a lien on the subject-matter for charges was not a claim to an interest in the property itself. Accordingly, a party was allowed to avail himself of the Act, although he claimed a

²⁰ *Wing v. Spaulding* (1802), 23 Atl. Rep. 615; 64 Vt. 83.

²¹ *Clow v. King* (1860), Ct. of Session, 13 D. 132.

²² *Mitchell v. Hayne* (1824), 2 Sim. & Stu. 63; *Bird v. Neff*, 1 T. & H. Pr. Pa. 434.

²³ *Lawson v. Terminal* (1893), 70 Hun. N. Y. 281.

²⁴ *Broddick v. Smith* (1832), 9 Bing. 84.

²⁵ *Crass v. Memphis* (1892), 11 So. Rep. Ala. 480.

²⁶ *Wakeman v. Dickey* (1865), 19 Abb. Pr. N. Y. 24.

²⁷ *Mitchell v. Hayne* (1824), 2 Sim. & Stu. 63.

lien on the goods in his hands for freight paid, and for storage, as against the claimants.³⁶

An auctioneer was allowed to interplead in a court of law as to purchase money in his hands, although he claimed the right to deduct his charges for commission.³⁷

In the United States an attorney who has collected money is allowed to file a bill of interpleader against his client and a third person, although he claims part of it to compensate him for his services.³⁸ A claim for fees against the fund is not such an interest as will prevent him from maintaining his bill.³⁹

In Ontario it was enacted in 1869,⁴⁰ that it should not be necessary in order to entitle any common carrier or other bailee of goods and chattels to relief by way of interpleader, that he should abandon any lawful lien he might have upon the goods and chattels, the subject of the application.

In England the present practice is found in the Rules of 1883,⁴¹ which provides that the applicant must satisfy the court that he claims no interest in the subject matter in dispute other than for charges or costs.

In Ontario and the other Provinces and Colonies in which the English Interpleader Code is in force,⁴² the same rule prevails, which requires the applicant to disclaim interest except for charges or costs.⁴³ The wording of the Ontario Rule now reads, "in respect of a lien, or for charges or costs."

In the American States the Interpleader Codes are all silent on this question of requiring the applicant to disclaim interest, but most of them require that he shall pay into court the full amount claimed, which by implication means that he cannot claim any part of the subject-matter.⁴⁴

³⁶ *Cotter v. Bank of England* (1834), 2 Dowl. 728.

³⁷ *Best v. Hayes* (1863), 1 H. & C. 718.

³⁸ *Gibson v. Goldthwaite* (1845), 7 Ala. 281.

³⁹ *McFadden v. Swinerton* (1900), 50 Pac. 816 (Oregon).

⁴⁰ 33 Vict. Ont. c. 17.

⁴¹ Order LVII., Rule 2 (a).

⁴² Ont. Rule 1104 (a).

⁴³ *McDonald v. McKenzie* (1888), 20 Nova Scotia 527.

⁴⁴ See Appendix.

In India, the Code there in force, requires the applicant to show that he has no interest otherwise than as a mere stakeholder,⁴⁵ and it has been decided that a railway company claiming a lien for its charges is entitled to relief.⁴⁶

When rights asserted against claimants.—Interpleader rests upon the fundamental principle that the applicant is the mere holder of a stake, which is to be contested for by the other parties, he standing wholly indifferent between them. If the applicant asserts a right or claim against either or both of the claimants, it is fatal to his application.⁴⁷ An insurance company was refused relief where it sought to have a dispute settled with one of the claimants, as to the date from which interest should be charged upon the fund in question;⁴⁸ so a debtor was debarred from maintaining interpleader, where he claimed a set-off against one of the adverse claimants.⁴⁹

A stakeholder who has been sued by one of the claimants may have a good defence, but when the second claimant appears he need not insist upon his defence, but may waive it and elect to seek a remedy by interpleading, and the fact that he might have successfully contested the action will not prejudice him in his interpleader.⁵⁰

If legality of claim denied.—An applicant, however, cannot maintain his interpleader and at the same time defend a claimant's action, denying that either one or both of the claimants have any valid legal or equitable claim against him. If he do this instead of paying the money into court, he loses his independent position, and cannot then claim any of the considerations due to a stakeholder. If the stakeholder plead in an action, with full knowledge

⁴⁵ Act 14 of 1882 c. 13, s. 471.

⁴⁶ *Bombay, etc., Railway Co. v. Sassoon* (1893), 8 Bombay 231.

⁴⁷ *Bedell v. Hoffman* (1830), 2 Paige N. Y. 180; *Hyman v. Cameron* (1872), 46 Miss., p. 727; *North Pacific Lumber Co. v. Lang* (1895), 42 Pac. Rep. 799 (Or.).

⁴⁸ *Bigold v. Audland* (1840), 11 Sim. 23.

⁴⁹ *McNaughton v. Webster* (1890), 6 U. C. L. J. O. S. 17.

⁵⁰ *Hartford Life and Annuity Ins. Co. v. Cummings* (1897), 50 Neb. 236; *Bernstein v. Hamilton* (1898), 26 App. Div. 206 N. Y. *Grill v. Globe* (1900), 55 App. Div. 612 N. Y.

of the facts, it is a waiver and an abandonment of the right to relief by interpleader.⁵¹

Must admit liability. — The applicant must therefore admit a liability, to whichever claimant shall establish his title,⁵² but he does not necessarily confess that the fund must absolutely belong to either claimant. By paying it into court, and asking the court to adjudicate, he in effect says the money may not belong to the second claimant.⁵³ It may be that there is some other claimant not present, whose title is superior to those who have appeared.

When he disputes part of debt claimed.—When there is any question raised as to the amount for which the applicant is liable, it is a rule that he cannot maintain his interpleader proceedings, and so he will be refused relief, unless he admits liability for the full amount claimed.⁵⁴ The reason for this, is, that the interpleader will not dispose of the whole matter, there will still be a controversy between the debtor and one of the claimants, and besides a claimant should not be required to separate his claim, and be obliged to enforce it in two separate proceedings.⁵⁵

Where two persons each sued a third for a commission for selling a hotel, and one of them included in his suit a further claim for commission for selling the furniture, and the defendant offered to pay into court sufficient to cover the first debt only, interpleader was refused.⁵⁶

⁵¹ *Hellman v. Schneider* (1874), 75 Ill. 422; *Russell v. Church* (1870), 65 Pa. St. 9; *Johnston v. Oliver* (1894), 51 Ohio 6; *Brown v. Campbell* (1895), 110 Cal. 644; *Hartford Life and Annuity Ins. Co. v. Cummings* (1897), 50 Neb. 236; *Bernstein v. Hamilton* (1898), 26 App. Div. 206 (N. Y.); *Montague v. Jeweler's* (1899), 58 N. Y. S. 715; *Southwark v. Childs* (1899), 39 App. Div. 560 (N. Y.).

⁵² *Bernstein v. Hamilton* (1898), 26 App. Div. 206 (N. Y.); *Browning v. Watkins* (1848), 10 S. & M. 482 (Miss.).

⁵³ *Keener v. Grand Lodge A. O. U. W.* (1889), 38 Mo. App. 543.
⁵⁴ *Diplock v. Hammond* (1853), 23 L. J. Chy. 550; *Chamberlain v. O'Connor* (1853), 8 How. N. Y. 45; *Patterson v. Perry* (1857), 14 Row. N. Y. 505; *Jackson v. Knickerbocker* (1900), 62 N. Y. S. 1109; *Pfister v. Wade* (1880), 58 Cal. 43; *Baltimore v. Arthur* (1882), 90 N. Y. 234; *New England v. Odell* (1888), 50 Hun. N. Y. 279; *Du Bois v. Union Dime Savings Institution* (1895), 89 Hun. N. Y. 382; *Van Zandt v. Van Zandt* (1899), 17 Civ. Pro. N. Y. 448; *Glasner v. Weisberg* (1891), 43 Mo. App. 214; *Southwestern Telegraph and Telephone Co. v. Benson* (1896), 63 Ark. 283.

⁵⁵ *New England v. Odell* (1888), 50 Hun. N. Y. 279.

⁵⁶ *Carroll v. Demarest* (1899), 58 N. Y. S. 1028.

But where a defendant claimed a few more dollars than a plaintiff seeking relief admitted, the plaintiff was allowed to amend so as to admit the amount claimed;⁵⁷ while a bill, which offered to pay what was due was not considered bad, because the plaintiff brought into court less money than was in fact due.⁵⁸ The plaintiff cannot adjust his own claims against the matter in controversy, and ask the defendants to interplead as to the balance.⁵⁹ It has been held in Massachusetts, that if the plaintiff is entitled to have the parties interplead as to some of the matters alleged, though not as to all, the bill should not be dismissed.⁶⁰

The rule just mentioned has not been universally followed, and interpleader has in some cases been allowed in respect of the amount of a debt admitted by the debtor to be due, although one claimant has asserted a larger sum owing to him, but in such cases the claimant's action against the debtor was not stayed as to the excess.⁶¹

In England the rule is now well settled that a person may interplead as to part of a debt claimed, although he disputes that he owes the balance. The object of this rule, is to prevent a plaintiff from making an unjust demand for a larger sum than is really due to him, in order purposely to defeat interpleader proceedings.⁶²

When several claimants each claim part of a fund and all together claim an amount in the aggregate more than the fund, interpleader has been allowed, as where a number of persons claim as lien holders.⁶³

Where a sheriff paid part of the proceeds of goods taken in execution to the first execution creditor, taking an in-

⁵⁷ *Orient v. Reed* (1889), 81 Cal. 145.

⁵⁸ *Ketchum v. Brazil* (1883), 88 Ind. 515.

⁵⁹ *Williams v. Matthews* (1890), 47 N. J. Eq. 196.

⁶⁰ *Fairbanks v. Belknap* (1883), 135 Mass. 179.

⁶¹ *City Bank v. Bangs* (1831), 2 Paige N. Y. 570; *Milwaukee v. O'Sullivan* (1870), 25 Wis. 686.

⁶² *Reading v. London School Board* (1880), 10 Q. B. D. 696; *McIntyre v. Woods* (1888), 5 Man. 347.

⁶³ *School District v. Weston* (1875), 31 Mich. 80; *Van Zandt v. Van Zandt* (1889), 17 Civ. Pro. N. Y. 448; *In re Barbier* (1885), 3 New Zealand M. 370; but see *Ammendale v. Anderson* (1880), 71 Md. 128.

demnity, it was held that he could not call upon a claimant of the whole fund to interplead with a second execution creditor as to the balance.⁶⁴

In New Jersey, the plaintiff in a bill of interpleader made several contracts for the filling in of certain wet land with the defendants, agreeing to pay each according to the number of cubic yards of material deposited, to be ascertained by a measurement at the place upon completion of the work. Each defendant knew of the other contracts, and of the method to be followed in computing the compensation. Through the neglect of the defendants a confusion of their deposits was occasioned, so that each claimed payment for so large a quantity, that the sum of their claims admittedly exceeded the total amount deposited. The plaintiff was ready to pay for the total amount deposited, but because of the confusion and the consequent dispute between the defendants did not know in what proportion to distribute the total sum. It was held that the bill must be sustained.⁶⁵

In Manitoba it has been held, that a garnishee may obtain interpleader as to the amount he admits to be due, although he may deny liability as to further amounts claimed, as long as he submits for the determination of the court the question of further liability.⁶⁶

When estopped from claiming an interest.—A person by becoming the plaintiff in an interpleader suit, and who obtains a decree, cuts himself off by his suit and decree from any right which he had in the property;⁶⁷ nor can he after filing his bill, set up a right to the fund in controversy, because by his bill he has admitted that he has no interest in the fund.⁶⁸ If one claimant do not appear, the stakeholder cannot then change his mind and claim part of the fund which he has brought into court.⁶⁹

⁶⁴ *Adams v. Blackwell* (1884), 10 Ont. Pr. 168.

⁶⁵ *Packard v. Stevens* (1890), 46 Atl. 250 (N. J.).

⁶⁶ *Rogers v. Commercial Union Assce. Co.* (1895), 10 Man. 687.

⁶⁷ *Supreme Council v. Bennett* (1890), 19 Atl. Rep. N. J. 785.

⁶⁸ *Anderson v. Wilkinson* (1848), 10 Sm. & M. Miss. 601.

⁶⁹ *Cogswell v. Armstrong* (1875), 77 Ill. 159.

CHAPTER III.

THE SUBJECT MATTER.

Generally.—The subject matter, in interpleader, is generally personal property of some description, such as money, goods, or chattels; but most frequently, perhaps, relates to a debt, duty, or other chose in action. In some cases in equity, and under some interpleader statutes, the remedy also lies when the matter claimed adversely is real property.

Value of the subject matter.—When the property in dispute is definite and certain in character, as a specific chattel, that is sufficient, its exact value is wholly immaterial, as in the case of bank shares.¹ The vexation of double proceedings can scarcely be considered less, because they relate to a small matter. If the claimants, upon one of whom the expense of the interpleader suit must fall, think the subject of it worth pursuit, they cannot complain that the holder of the stake prefers to be a party in one suit, rather than in two.² But when the amount in dispute has been small, courts of equity have sometimes been loath to allow interpleader, because the expense of a bill might soon absorb a considerable portion, if not the whole, of the fund in controversy, and if relief can be had in any other way, the bill will be refused.³ A bill for a sum under £10 was dismissed as beneath the dignity of the court.⁴

¹ *Lincoln v. Rutland* (1852), 24 Vt. 630; *Cady v. Potter* (1860), 55 Barb. N. Y. 463.

² *Crawford v. Fisher* (1840), 1 Hare, 436.

³ *Bleeker v. Graham* (1836), 2 Ed., Chy. N. Y. 647.

⁴ *Smith v. Target* (1796), 2 Aust. 529; see also *Wallace v. Sortor* (1883), 52 Mich. 150.

The amount of a fund in dispute, must be ascertained with sufficient certainty to enable it to be brought into court,⁵ but the amount may be enquired into to ascertain whether the plaintiff can maintain his suit.⁶ He must state in the affidavit upon which his motion is founded, the specific sum or goods in his hands which are claimed.⁷

Must be distinct and tangible.—Where two real estate brokers each claimed a commission, under independent contracts by reason of the same sale, the principal's personal liability was held not such a distinct fund as would authorize a bill of interpleader.⁸ To enable a sheriff to interplead, the subject matter must be something tangible at the time of seizure; and relief was not granted, where the sheriff asked protection in respect of a tenant right, consisting of seed and manure in the ground, because a claim to them could not be a claim to goods and chattels.⁹

Unliquidated damages.—Interpleader will not lie, when the claims are for unliquidated damages, or when one claim is for damages, although the other may be a demand for specific property.¹⁰ It has been said, that in framing the English interpleader provisions, the word 'damages' was intentionally left out, so that the remedy applies only to a debt, money, goods or chattels.¹¹

Identity of.—Interpleader will lie in some cases, although the identical property received cannot be produced, so long as the applicant is able to deliver property in kind and quantity equal to that received. Thus, a railway company was allowed relief, where they had stored a quantity of wheat received for transit, in an elevator along with other wheat of the same quality, although they could not deliver exactly the same wheat which was alleged to be in question.¹²

⁵ *Finlay v. American* (1855), 11 How. N. Y. 468.

⁶ *Williams v. Matthews* (1890), 47 L. J. Eq. 106.

⁷ *Buller v. —* (1833), 3 L. J. C. P. 62.

⁸ *McCreery v. Inge* (1900), 49 App. Div. 133 N. Y.

⁹ *Bateman v. Farnsworth* (1860), 29 L. J. Ex. 365.

¹⁰ *Walter v. Nicholson* (1838), 6 Dowl. 517; see further under heading "Same thing must be claimed," also chapter VI.

¹¹ *Ingham v. Walker* (1887), 31 Sol. J. 271.

¹² *Re Canadian Pacific Railway v. Carruthers* (1896), 17 Ont. Pr. 277.

A stakeholder never pays over the identical sovereigns deposited with him.¹² An interpleader suit therefore, is not in its nature a proceeding *in rem*, because it is not the status of any particular money which is in question, for any money which is a legal tender will effectually satisfy the claim of the party who will receive it.¹⁴ Where it happened, that the subject matter consisted of bank notes, which the successful claimant was at one time willing to take, but which subsequently went below par, the applicant was directed to make good the amount in current specie.¹⁵

Company shares, dividends. — Interpleader will lie in respect of shares of the stock of an incorporated company, although they are choses in action and not tangible chattels. The English and Canadian provisions cover any debt, money, goods or chattels, and the latter term is one of the widest words known to the law in its relation to personal property.¹⁶ It has also been granted in respect of shares in a registered vessel,¹⁷ and of dividends due on a company's shares.¹⁸ A Scotch railway was authorized by Act of Parliament to issue debenture stock to the extent of £82,000 to such creditors as should demand it, one having obtained a decree for £935 and a second for £162,000, the railway company was allowed relief in an action of multiplepoinding.¹⁹

Money on deposit. — Money on deposit in bank may also be the subject of an interpleader,²⁰ as well as a balance in a loan company's hands, part of a loan secured by a mortgage to the company, and held back to pay off certain charges.²¹ In New York, where the banking laws provide

¹² Dowson v. McFarlane (1890), 81 L. T. 67.

¹⁴ Cross v. Armstrong (1887), 44 Ohio St. 613.

¹⁵ Knight v. Yarborough (1846), 7 S. & M. (Misc.) 179.

¹⁶ Robinson v. Jenkins (1890), 24 Q. B. D. 275; Re Underfeed Stoker Co. of America et al. (1901), 1 Ont. 42; Brown v. Nelson (1884), 10 Ont. Pr. 421; Walker v. Bamberger (1898), 17 Utah 239; but see contra Chicago Edison Company v. Fay (1896), 164 Ill. 323.

¹⁷ Vindin v. Wallis (1864), 24 Upper Canada Q. B. 9.

¹⁸ Salisbury v. Townsend (1871), 100 Mass. 115.

¹⁹ Girvan, etc., Ry. v. Lamond (1896), Ct. of Session, 13 B. 931.

²⁰ James v. Sams (1892), 90 Georgia, 404.

²¹ Franco v. Joy (1894), 56 Mo. App. 433.

specially for the relief of savings banks when money on deposit is claimed adversely,²² it has been held that this does not cover the case of a draft sued upon.²³ Interpleader will lie when part only of a deposit is claimed.²⁴

Land.—When land is claimed adversely from a person in possession, or in whom the title is vested, it would seem that a bill or an action of interpleader will lie.²⁵ But under interpleader statutes, land cannot ordinarily be the subject of interpleader, unless specially mentioned, as it is in some cases.²⁶ Thus it has been held, that when a sheriff levies on land, or on an interest in land, he can physically seize upon nothing, and his levy need not be made upon or in view of the premises. The interpleader rules afford him no protection, because he needs none, as he can perform his official duty without risk of any sort.²⁷

In Ontario a sheriff may interplead when lands and tenements are taken or intended to be taken in execution.² Hence a sheriff has been relieved, when he was directed to execute a writ of possession in respect of lands, and a defendant to the writ, and who was in possession, claimed the lands as guardian for certain infant children in whom it was alleged the title was vested;³ as also where a house was securely locked, and a third person in possession of the key, notified the sheriff that he was the owner and threatened an action for damages if the sheriff should attempt to enter.⁴ The same provision formerly existed in Manitoba, but was not consolidated in the Code of 1895.

Fixtures.—Fixtures attached to the freehold may be the subject of interpleader, for they are often removable as

²² Sec. 115, c. 689, of the Laws of 1892.

²³ *Master v. Bowery Savings Bank* (1900), 63 N. Y. S. 904.

²⁴ *Progressive v. German* (1890), 29 N. Y. S. R. 528.

²⁵ *Farley v. Blood* (1854), 30 New Hampshire 354.

²⁶ See in Appendix.

²⁷ *Maurer v. Sheaffer* (1887), 116 Pa. St. 339; see also *Gardiner v. Hinds* (1874), 8 Ir. L. T. & Sol. J. 401.

² Ont. Rule 1103 (h).

³ *Emerson v. Humphries* (1892), 15 Ont. Pr. 84; and see *Adamson v. Adamson* (1887), 12 Ont. Pr. p. 23.

⁴ *Hall v. Bowerman* (1900), 19 Ont. Pr. 208.

chattels; and where a sheriff had levied on machinery thus attached, he was held not bound to determine, whether the property was real or personal, it was enough if there were conflicting claims.²⁰ An issue may accordingly be directed to determine whether the property levied on is personality or realty.²¹ Interpleader has been allowed, where the articles seized were a culm separator plant, consisting of buildings and machinery.²²

Growing crops.—Interpleader has been allowed to a sheriff, in respect of growing crops, levied upon by him.²³

Deeds and papers.—The title deeds of land, and other papers, may be the subject of an interpleader. Thus relief was granted to a bank, with which title deeds had been deposited as security for a loan, and were claimed by the heir of the depositor and by a grantee of the land;²⁴ and to a person in possession of deeds and papers, which came to him through the death of a guest in his house.²⁵ It would seem to be the practice, to allow a sheriff to interplead, when he has seized the chattels of a corporation, which are subject to a charge in favour of debenture holders.²⁶

Proceeds of land.—Under an Interpleader Act, which provided that a sheriff might interplead as to the proceeds or value of lands taken and sold under any process, it has been held by the Supreme Court of Canada, that interpleader will not be granted, where a purchaser of land voluntarily pays to the sheriff the amount of an execution in his hands, in a *bona fide* belief that it is a charge upon the land, and the proceeds are claimed by a third party, because the lands are neither taken nor sold under execution.²⁷

²⁰ *Prichett v. McWilliams* (1875), 2 W. N. Ca. Pa. 353; *Sun Life v. Taylor* (1893), 9 Man. 89.

²¹ *Kisterbock v. Todd* (1884), 16 W. N. C. Pa. 47.

²² *Advance Coal Co. v. Miller*, 7 Kulp Pa. 541.

²³ *Hamilton Provident v. Campbell* (1884), 12 Ont. App. 250.

²⁴ *Roberts v. Bell* (1857), 7 Ell. & Bl. 323.

²⁵ *Walker v. Ker* (1843), 12 L. J. Ex. 204.

²⁶ *Davey v. Williamson* (1898), 2 Q. B. 194.

²⁷ *Federal Bank v. Canadian Bank of Commerce* (1886), 13 Canadian S. C. R. 384.

Proceeds of goods.—When a sheriff seizes goods under a writ of *fi. fa.*, and a person other than the person against whom the process issued, claims the goods, and pays out the sheriff under protest, the money so paid to the sheriff is the proceeds of goods taken in execution, within the meaning of the English rule, and may be the subject of an interpleader.³⁸

Goods sold but not delivered.—Where a sheriff had seized and sold an article under an execution, and, before it was delivered, it was claimed both by the purchaser and by a third party who alleged that he acquired it directly from the debtor, the sheriff was allowed relief.³⁹ The sheriff sells only the debtor's interest, so it cannot be said that the purchaser's claim is obviously good.

Balance after satisfying an execution.—A balance of the proceeds of goods, remaining after an execution creditor has been paid, may be the subject of an interpleader, when claimed from the sheriff by the execution debtor and a subsequent execution creditor.⁴⁰

A reward.—A reward, offered for information leading to the apprehension and conviction of a felon, may be the subject of an interpleader, when more than one party claims it,⁴¹ as well as a reward offered for the recovery of property lost or stolen.⁴²

An award.—An award for land taken for public purposes, such as a street, may be the subject of an interpleader, when the amount awarded is claimed by rival claimants from the corporation.⁴³

Slaves.—Slaves were frequently the subject of inter-

³⁸ *Smith v. Critchfield* (1885), 14 Q. B. D. 873.

³⁹ *Gants v. McCracken*, 4 York Pa. 184.

⁴⁰ *Warnock v. Lealie* (1882), 10 Ir. R. C. L. 68; *Ormsby v. Wight* (1893), 27 Ir. L. T. R. 134.

⁴¹ *Gay v. Pittman* (1887), 1 Jur. 775; *Fargo v. Arthur* (1872), 43 How. N. Y. 193; but see to the contrary *Grant v. Fry* (1835), 4 Dowl. 135; *Collis v. Lee* (1835), 1 Hodges 204; *Burritt v. Press Publishing Co.* (1897), 19 App. Div. 609 and 25 App. Div. 141 N. Y.

⁴² *City Bank v. Bangs* (1831), 2 Paige N. Y. 570; *Howland v. Lounds* (1873), 51 N. Y. 604.

⁴³ *Pollock v. Morris* (1887), 105 N. Y. 676.

pleader in the United States, before the abolition of the slave trade.⁴⁴

Wagering stakes.—Interpleader will not be allowed to the holder of a stake, deposited with him to abide the event of an illegal race.⁴⁵ With regard to the propriety of an interpleader order, made at the instance of the holder of a stake on a billiard match, the English Court of Appeal has recently offered the following remarks, in dealing with a question which affected only the two claimants:—One member of the court gave it as his opinion, that where the ordinary claim appears to be in respect of a sum claimed as winnings under a wagering contract, it is very doubtful whether the court ought to recognize that the stakeholder can have any expectation of being sued for such a sum. Another member of the court agreed concerning the care which ought to be exercised, in directing an issue where a stakeholder is dealing with moneys deposited under a wagering contract. He did not think it would be going too far to say, that an issue ought not to be directed, where the claimants of the money deposited are the parties to the wager, and appear to be trying to get the decision of the court as to which of them is entitled to the stakes.⁴⁶

Same thing must be claimed.—The same thing, debt, or duty, must be claimed by both or all of the parties against whom the relief is demanded.⁴⁷ When the subject in dispute has a bodily existence, no difficulty can arise on the ground of identity; but where the subject is a chose in action, which has no bodily existence, it becomes necessary to determine what constitutes identity. Where the claims made are of different amounts, they can never be identical, but where they are the same in amount, that circumstance

⁴⁴ See *Burton v. Black* (1861), 32 Ga. 53.

⁴⁵ *Applegarth v. Colley* (1842), 2 Dowl. N. S. 223.

⁴⁶ *Schoolbred v. Roberts* (1900), 2 Q. B. 497.

⁴⁷ *Crane v. Burntrager* (1848), 1 Carter Ind. 165; *Oil Run v. Gale* (1873), 6 W. Va. 525; *Pfister v. Wade* (1880), 56 Cal. 43; *Wilkinson v. Searcy* (1883), 74 Ala. 243; *Wells v. Miner* (1885), 25 Fed. Rep. Cal. 533; *National v. Platte* (1894), 54 Ill. App. 483; *Johnston v. Oliver* (1894), 51 Ohio, 6.

goes far to determine their identity. The amount may not be sufficient of itself, for the amount may be the same, and the debts different.⁴⁴

The claims must refer to the same subject matter, and not to collateral demands arising out of the right immediately in dispute,⁴⁵ interpleader was never intended to apply to different claims, merely because they originate out of one transaction; so interpleader was refused to a person who had had a house built for himself, and admitted a sum due, when the architect sued for the contract price, the contractor employed by the architect and who had been dismissed claimed the price of his contract or damages for dismissal, while claims were also made by an assignee of the contractor, and by artisans.⁴⁶ It has been decided in Mississippi, that it does not matter, that the claims are upon an open account for the value of property, so long as each claimant claims the same amount.⁴⁷

When one person claims the subject matter or its proceeds, from the applicant for relief, and a second claims unliquidated damages for conversion, or for breach of warranty, or for negligence in selling, or for not accepting a bill of exchange for the price, interpleader will not lie, because the parties do not claim the same thing, the claim of the person seeking damages is against the applicant personally and not against the fund or property in his hands.⁴⁸ Nor will interpleader lie, when both claimants claim damages against the person seeking to interplead.⁴⁹

⁴⁴ *Glyn v. Duesbury* (1840), 11 Sim. 139.

⁴⁵ *Barclay v. Curtis* (1821), 9 Price, 661.

⁴⁶ *Wells v. Glascock* (1898), 19 Victoria L. R. 116.

⁴⁷ *Boyle v. Manion* (1896), 21 So. Rep. 530 (Miss.).

⁴⁸ *Barclay v. Curtis* (1821), 9 Price 661; *Walter v. Nicholson* (1838), 6 Dowl. 517; *Slaney v. Sidney* (1845), 14 M. & W. 900; *Wright v. Freeman* (1879), 48 L. J. O. P. 276; *Re Benfield and Stevens* (1887), 17 Ont. Pr. 300 and 389; *American v. Day* (1885), 52 N. Y. Super. Ct. 128; *Ingham v. Walker* (1887), 31 Sol. J. 271; *Delaware v. Corwith* (1889), 16 Civ. Pro. N. Y. 312; *Ryan v. Lamson* (1894), 153 Ill. 520; *North Pacific Lumber Co. v. Lang* (1895), 42 Pac. Rep. 799, Oregon; *Coleman v. Chambers* (1900), 29 So. Rep. 58 Ala.; Note in *Harvard Law Rev.* Vol. 15, p. 63 (1901).

⁴⁹ *Fulton v. Chase* (1889), 25 N. Y. St. Rep. 711.

Cases in which relief refused.—A purchaser will not be allowed to interplead, when one party claims the property itself, and another claims the purchase money or price, because they are not demands for the same debt;⁵⁴ nor will the remedy lie, when one claim is for payment of an acceptance, and the other for the price of the goods sold;⁵⁵ or where one claimant sues on a bond, and the other claims for money had and received to his use.⁵⁶

An auctioneer cannot interplead as to a deposit in his hands, when the vendor claims it as forfeited, while the purchaser seeks to enforce the contract;⁵⁷ nor can the trustees of a separation deed interplead when the husband claims an annuity under the deed, while the wife alleging the deed invalid claims the annual proceeds without deduction, because it is not the same debt or duty which is claimed.⁵⁸ It is not two persons claiming the same thing, when one action is based upon an award, and the second claimant alleges that he is entitled to the debt upon which the award is predicated.⁵⁹

Interpleader was refused, where one claimant asked payment of a debt for plumbing, and the other asked the same amount for services rendered as architect and surveyor;⁶⁰ so relief was not allowed, where one claimant sued for his commission for the sale of property, and another claimant for services in the sale of the same property, as these are not demands for the same debt and do not necessarily conflict.⁶¹ If two auctioneers each sue the same defendant, for a commission for the sale of the same house, and the amounts claimed are not the same, he cannot interplead, because the claims are wholly different;⁶² but if the amounts

⁵⁴ *Carrico v. Tomlinson* (1853), 17 Mo. 490; *Baxter v. Day* (1888), 73 Wis. 27.

⁵⁵ *Bassett v. Leslie* (1890), 33 N. Y. St. Rep. 685.

⁵⁶ *Johnston v. Oliver* (1894), 51 Ohio St. 6.

⁵⁷ *Sharpe v. Redman* (1837), 1 Will. W. & D. 375.

⁵⁸ *Doyle v. Dunmoncel* (1847), 11 Ir. Eq. R. 342.

⁵⁹ *Heymen v. Smadbeck* (1894), 58 N. Y. St. Rep. 10.

⁶⁰ *Glyn v. Duesbury* (1840), 11 Sim. 139.

⁶¹ *Taylor v. Salterthwaite* (1893), 51 N. Y. St. Rep. 505.

⁶² *Greatorex v. Shackle* (1895), 15 R. 501; 2 Q. B. 249.

claimed are the same, interpleader will lie.⁶⁵ It may happen, however, that the amounts are the same, and that the claims are not to the same debt,⁶⁶ when relief will be refused; as it will be when the vendor has incautiously committed himself with two estate agents,⁶⁷ or where each has procured him a separate purchaser.⁶⁸

A tenant cannot interplead when the landlord claims the rent, and a second person claims the value of use and occupation, because the things actually demanded are different;⁶⁹ and it does not matter that both are claimed for the same period.⁷⁰ A tenant, who takes an independent lease from each of the two adverse claimants to the property, cannot call on them to interplead, because it is not the same debt which is demanded by each.⁷¹

The lord of the liberty and his tenants were refused relief, when two rectors claimed, one tithes in kind, and the other a modus, which means a paying of tithes different from the general rule of payme: in kind.⁷² A sheriff to whom moneys had been paid under an execution, found that the debtor claimed that they should be set off against a larger judgment which the debtor had against the execution creditor, the latter having sued the sheriff for the fund, the sheriff was refused an interpleader order, on the ground that the interpleader act only applied to the case of two claimants for the same fund.⁷³

If both claimants have recovered judgments against the person seeking to interplead, they are no longer claiming the same debt and he cannot have relief.⁷⁴

⁶⁵ *Dreyer v. Rauch* (1871), 42 How. N. Y. 22; *Shipman v. Scott* (1887), 6 N. Y. St. Rep. 284; *Brooke v. Smith*, 13 C. C. Pa. 557; 33 W. N. C. Pa. 74.

⁶⁶ *Chamberlain v. Almy* (1893), 52 N. Y. St. Rep. 522; *McCreery v. Luge* (1900), 49 App. Div. N. Y. 133.

⁶⁷ *Sachsel v. Farrar* (1890), 35 Ill. App. 277.

⁶⁸ *Shipman v. Scott* (1887), 6 N. Y. St. Rep. 284.

⁶⁹ *Johnson v. Atkinson* (1797), 3 Anst. 798.

⁷⁰ *Dodd v. Bellows* (1878), 29 N. J. Eq. 127.

⁷¹ *Standley v. Roberts* (1894), 59 Fed. Rep. Ind. T. 836.

⁷² *Wollaston v. Wright* (1797), 3 Anst. 801.

⁷³ *Smith v. Saunders* (1877), 37 L. T. 350.

⁷⁴ *Victoria v. Bethune* (1877), 1 Ont. App. 398.

For the same reason, interpleader was refused to a life insurance company, when claims were made, one for the present cash value of the policy, a second for the policy and all benefits under it, while a third asked that matters stand until a claim might mature.⁷³ A defendant sued for the use of plaintiff's teams, is not entitled to an order of interpleader, where a third party seeks payment from the defendant for the keep of the horses, since the claimant and plaintiff do not claim the same thing.⁷⁴

Cases in which allowed.—Interpleader has been allowed in some cases, where it might be hard to distinguish them from the above. A fire insurance company has been allowed relief, where a landlord brought his action for the insurance moneys and a tenant filed a bill to have them laid out in rebuilding; it was said that although the mode of relief was different the subject was the same, namely getting in the money.⁷⁵ Where one claimant claimed certain shares in a stock company, and the other claimed the stock certificate, the claims were looked on as sufficiently for the same thing to allow interpleader.⁷⁶ Where each of two claimants insisted, that the purchaser was his customer, and each claimed the commission the vendor was allowed to interplead.⁷⁷ In changing the beneficiary under a life policy, the insured did not give up the first policy to be surrendered, alleging that it had been lost, and a new one was issued, upon his death both beneficiaries claimed the insurance moneys. It was held, that though there were two written instruments outstanding, there was but one insurance effected, and but one set of premiums paid, and therefore the same thing was claimed, and interpleader lay.⁷⁸

Where two persons made a bet on a horse race, and each deposited a sum with a stakeholder, who was to pay the

⁷³ *Travellers Ins. Co. v. Henley* (1895), 86 Hun. N. Y. 524.

⁷⁴ *Freda v. Montauk Co.* (1899), 55 N. Y. S. 748.

⁷⁵ *Paris v. Gilham* (1813), 1 Cooper, 59.

⁷⁶ *Robinson v. Jenkins* (1890), 24 Q. B. D. 275.

⁷⁷ *Dreyer v. Rauch* (1871), 42 How. N. Y. 22; *Shipman v. Scott* (1887), 6 N. Y. St. Rep. 2-1.

⁷⁸ *McCornick v. Supreme Council Catholic Benevolent Legion* (1896), 6 App. Div. 175 N. Y.

stakes to the winner less a commission, and a dispute arising as to the fairness of the race, the winner sued for the stakes, while the other party claimed them too, or in the alternative the return of his deposit, interpleader was allowed, notwithstanding the objection that the debt claimed by one was not the same as that sued for by the other.⁷⁹

When part of fund claimed.—It seems to be a fairly well settled rule that interpleader will lie, although one claimant claims only part of the fund, while the other claims the whole. The custodian of the fund must be willing however, either to pay the larger sum into court, or to pay the difference between the sums claimed to the person claiming the whole fund.⁸⁰ What is meant by a demand for the same debt, is such a demand as may be satisfied or discharged out of the fund, so that it is no objection that one claims the whole and the other part.⁸¹

Where there are several claimants to parts of the fund, a bill of interpleader will lie to compel them to ascertain their shares, and to settle their priorities.⁸²

If an applicant for relief has paid into court, only part of the whole fund, he will only be protected as to the amount paid in, and will still remain liable for the deduction which he has made.⁸³

Some of the codes in the American States are worded, that the second claim must be to the *same* debt or property,

⁷⁹ *Dowson v. McFarlane* (1890), 81 L. T. 67.

⁸⁰ *Stuart v. Welch* (1839), 4 Myl. & Cr. pp. 310, 317; *Moore v. Usher* (1835), 7 Sim. 384; *McKenzie v. Aetna* (1879), *Russell's Eq. Dic. Nova Scotia*, p. 346; *McIntyre v. Woods* (1888), 5 Man. 347; *Fairbanks v. Belknap* (1883), 135 Mass. 179; *Thomson v. Ebbets* (1824), 1 Hop. N. Y. 272; *Yates v. Tisdale* (1837), 3 Ed. Ch. N. Y. 71; *Progressive v. German* (1890), 29 N. Y. St. Rep. 528; *Roselle v. Farmers Bank* (1893), 119 Mo. 84; but see *Pfister v. Wade* (1880), 56 Cal. 43; *McNaughton v. Webster* (1890), 6 U. C. L. J. O. S. 17.

⁸¹ *Barnes v. New York* (1882), 27 Hun. N. Y. 236.

⁸² *Van Zandt v. Van Zandt* (1889), 17 Civ. Pro. N. Y. 448; *Koenig v. N. Y. Life Ins. Co.* (1888), 14 N. Y. St. Rep. 250; but see *Pfister v. Wade* (1880), 56 Cal. 43; 69 Cal. 133; where it was said that there may be cases in which all the fund may not be claimed by each of the defendants, but it must appear at least, that the defendants assert adverse claims to all and every part of it.

⁸³ *Toulmin v. Reid* (1851), 14 Beav. p. 506.

the word 'same' does not appear in the English Rules. It has accordingly been held in New York State, that when one claims the whole amount and the other only a part relief will lie in an action of interpleader, but not by a motion under the code.⁵⁴ It has been held in Scotland that a creditor claiming a small part of an estate cannot throw the whole estate into court for distribution by the expensive machinery of multiplepinding.⁵⁵ Where there were competing claimants to one half a trust estate, the right to the other half not being in dispute, one of the claimants raised an action of multiplepinding in the name of the trustee, bringing the whole estate into court as the fund in medio, it was held that the action was incompetent, although it might have been raised as to the half in dispute.⁵⁶

Payment or delivery.—The person seeking the assistance of the court, must always show his neutrality by declaring his willingness to pay the fund in his hands, or the debt owing by him, into court, or to deliver the property in his possession to such person as the court may direct.⁵⁷ This was the rule in an interpleader suit in chancery, and it applies as well to the more modern action of interpleader.⁵⁸ He must be prepared to pay the money into court, whether one claimant abandons or not.⁵⁹

A stakeholder admitting liability, is not bound to offer to pay the fund into court, as a condition of being exonerated, when a suit for the same is pending in another jurisdiction.⁶⁰ In California it has been held, that the plaintiff in an action of interpleader need not deposit the money

⁵⁴ *New England v. Keller* (1885), 7 Civ. Pro. N. Y. 100.

⁵⁵ *Kyd v. Waterson* (1880), Ct. of Session, 7 R. 884.

⁵⁶ *Macnab v. Waddell* (1894), Ct. of Session 21 R. 157.

⁵⁷ *Earl of Carlisle v. Andrews* (1761), 2 Eq. Ab. 173; *Meux v. Bell* (1833), 6 Sim. 175; *Shaw v. Chester* (1834), 2 Ed. Chy. N. Y. 405; *New York & Harlem Ry. Co. v. Haws* (1873), 35 N. Y. Sup. Ct. 372; *Shaw v. Chester* (1840), 8 Paige N. Y. 339; *Morrill v. Manhattan* (1898), 82 Ill. App. 410; *Snodgrass v. Butler* (1876), 54 Miss. 45; *Fowler v. Lee* (1839), 10 G. & J. Md. 358; *Ammendale v. Anderson* (1889), 71 Md. 128.

⁵⁸ *Van Zandt v. Van Zandt* (1889), 17 Civ. Pro. N. Y. 448.

⁵⁹ *McElheran v. London* (1836), 11 Ont. Pr. 181.

⁶⁰ *Barry v. Equitable* (1873), 14 Abb. P. R. N. Y. n. 335.

in court; but, the defendant in an action, when applying for relief, must do so.⁹¹

He must actually do so.—Besides offering to pay or transfer the subject matter as the court may direct, the person seeking relief must be in readiness to bring the money or thing into court, and must actually do so, before an injunction will be granted, or at least before the injunction takes effect.⁹² Where a bank sought to be relieved, it was held improper for the bank to open an account to the credit of the action, and it was obliged to pay the money into court.⁹³

It has been held in Kentucky, that a debtor may be allowed to interplead, although he may not be able presently to pay the money into court, but an injunction will not be granted until he gives bonds and security that he will ultimately pay the fund.⁹⁴ The fact that one of the claimants threatens to appeal, does not warrant the applicant in refusing to pay the money into court, under the interpleader order which he has obtained, it is his duty to comply with it;⁹⁵ and he may safely pay the money in, in pursuance of an interpleader judgment, in spite of irregularities in the interpleader suit, which are uncomplained of by the claimants.⁹⁶

Rules as to payment.—The rule is explicit and well settled, that on a bill of interpleader the plaintiff must bring the money into court, before he takes any step in the cause.⁹⁷ It is not necessary that he should offer by his bill to pay the money into court, it is sufficient if he brings it in before taking any other step.⁹⁸ A bill, is therefore defective, when the plaintiff neither brings the money into court nor offers to do so. The offer is required to prevent

⁹¹ *Fox v. Sutton* (1800), 59 Pac. 939 (Cal.).

⁹² *Morrill v. Manhattan* (1896), 82 Ill. App. 410; *Shaw v. Chester* (1834), 2 Ed. Ch. N. Y. 405; *New York & Harlem Ry. Co. v. Haws* (1873), 35 N. Y. Sup. Ct. 372.

⁹³ *Faivre v. Union* (1891), 36 N. Y. St. Rep. 79.

⁹⁴ *Biggs v. Kouns* (1838), 7 Dana Ky. 405.

⁹⁵ *Look v. McCabill* (1895), 106 Mich. 108.

⁹⁶ *Wheelock v. Godfrey* (1893), 35 Pac. Rep. (Cal.) 315.

⁹⁷ *Williams v. Walker* (1846), 2 Rich. Eq. 291 S. Ca.

⁹⁸ *Meux v. Bell* (1833), 6 Sim. 175.

an abuse of the proceeding, and although a bill is not demurrable because the money is not actually brought into court, yet when that is not done, the offer to do so must at least be made. The court will not require the claimants to interplead, until the money is either in court or subject to its order. Thereby the court takes jurisdiction and retains the possession and control of the fund.⁹⁹ It is not enough, that the plaintiff offers to pay the fund to the party who may be found entitled.¹ In an early decision it was said, that the plaintiff having offered to bring the money into court, it was not necessary for him to pay it in, unless the other side required it;² and that a defendant could not compel the plaintiff to bring the property into court, before the latter had applied for his injunction;³ and in Pennsylvania that payment into court is not a condition precedent to the issuing of an interpleader order.⁴

In the Scotch proceeding of multiplepounding consignation in every case is not required, but when dispensed with it is only for some good reason, and it is enough if the debtor is ready to find ample security that the debt will be forthcoming.⁵ Consignation when made is for the behoof of all concerned, according to their rights established or to be established. The fund may be said to be in *manibus curiae* as soon as the multiplepounding is brought into court, just as much as after the fund has been consigned. The fund is at the disposal of the court from the first. It is a question of circumstances and discretion whether consignation should be ordered. Consignation may be made by the stakeholder himself of his own accord, if he wants to be quit of any claim for interest, or any more responsibility

⁹⁹ Home Life Ins. Co. of N. Y. v. Caulk (1897), 86 Md. 385; Barroll v. Foreman (1898), 30 Atl. 273 Md.; Gardiner Savg. Inst. v. Emerson (1898), 91 Me. 535; Nash v. Smith (1827), 6 Conn. 421; M'Garrah v. Prather (1824), 1 Blackf. 299 Ind.

¹ Meux v. Bell (1833), 6 Sim. 175; Home Life Ins. Co. of N. Y. v. Caulk (1897), 86 Md. 385.

² Earl of Thanet v. Paterson (1738), 1 Barnard 247.

³ Clindinnin v. O'Keefe (1824), 1 Hog. 118.

⁴ Barnes v. Bamberger (1900), 196 Pa. St. 123.

⁵ Clow v. King (1850), Ct. of Sessions, 13 D. 132.

about it, while the court may order consignment at once if any body says there is danger of the fund not being forthcoming.⁶

Delivery of land.—When land is the subject of the controversy, it has been held, that the plaintiff ought to make conveyances of the same ready for delivery to each of the claimants.⁷

Control over subject.—It follows therefore, that the applicant for relief by interpleader must have the subject matter in his possession or custody and if it has gone out of his possession, so that he cannot bring it into court, interpleader will not lie, because he is unable then to do the only act for which an indemnity is given, and besides if he is out of possession he is no longer in jeopardy from conflicting claims.⁸ It must also be in his possession within the jurisdiction of the court.⁹

It has been held in Alabama, that a bailee is not justified in surrendering the property to either of the claimants. The statute contemplates that he shall retain possession until there is an interpleader, and deliver possession to the claimant who gives the required bond, and if neither gives the bond, it is his duty to retain the property to abide the result of the suit. The bailee violates his duty, when he delivers the property to the adversary claimant, and thus places the bailor at a disadvantage, and thereby puts himself without the pale of the statutory protection. Such an act amounts to a conversion, and prevents the further operation of the statute in his behalf. The policy and effect of the statute will be defeated, if, after giving the notices authorized by the statute, the bailee is allowed to conspire or collude with either claimant, to put the property beyond the reach of the other. The bailee is required to occupy a neutral position,

⁶ *Smith v. Grant* (1862), Ct. of Session, 24 D. 1142.

⁷ *Farley v. Blood* (1854), 30 New Hampshire, 354.

⁸ *Martin v. Maberry* (1828), 1 Deve N. Car. 169; *Cousens v. McGee* (1867), 4 W. W. & A. (Victoria) 29; *Vosburgh v. Huntington* (1855), 15 Abb. Pr. N. Y. 234; *Killian v. Ebbinghaus* (1883), 110 N. Y. 568.

⁹ *Re Brunswick Balke Co.* (1885), 3 Man. 324.

and to keep possession until he can under the provisions of the statute deliver the property to either party.¹⁰

If paid to one claimant.—A stakeholder therefore cannot interplead, when he has paid or transferred the subject to one of the claimants,¹¹ because one claimant is then satisfied, and there is no person to call upon to interplead with the unsatisfied claimant.¹² If the whole fund is brought into court, interpleader will lie, although part has been paid to one claimant before the other appeared,¹³ or where part has been paid to one of the claimants through a mistake.¹⁴ In Connecticut it is not the practice to bring the subject matter into court.¹⁵

In Ontario it has been held, that the remedy will lie, when the fund has been paid over in obedience to judicial authority, as where the applicant paid the money in question to one of the claimants, an assignee in insolvency, and the latter was willing to pay the fund into court to await the result of an issue.¹⁶ A debtor was also allowed a bill of interpleader, where he had paid his debt to a sheriff.¹⁷

When sheriff has parted with goods.—A sheriff cannot interplead, when he has sold the goods and paid the proceeds to the execution creditor before applying for relief,¹⁸ nor when he has given up the goods or a part of them to the claimant,¹⁹ nor when he has allowed the claimant to take

¹⁰ *Powell v. Robinson* (1884), 76 Ala. 423.

¹¹ *Tiernan v. Rescaniere* (1839), 10 G. & J. Md. 217; *Marvin v. Ellwood* (1844), 11 Paige N. Y. 365; *Philadelphia v. Clarke* (1881), 15 Phila. Pa. 289; *Hewitt v. Heise* (1885), 11 Ont. Pr. 47.

¹² *Inland v. Bushell* (1836), 5 Dowl. 147; *Henderson v. Watson* (1876), 23 Grant, Ont. 355.

¹³ *Allen v. Gilby* (1834), 3 Dowl. 143.

¹⁴ *Ormsby v. Wight* (1893), 27 Ir. L. T. R. 134.

¹⁵ *Consociated v. Staples* (1855), 23 Conn. 544.

¹⁶ *Watson v. Henderson* (1876), 6 Ont. Pr. 290.

¹⁷ *Davidson v. Douglas* (1865), 12 Grant, Ont., 181; and see also *Nash v. Smith* (1827), 6 Conn. 421.

¹⁸ *Anderson v. Calloway* (1832), 1 Dowl. p. 636; *Chalon v. Anderson* (1832), 3 Tyr. 237.

¹⁹ *Kirk v. Almond* (1832), 2 L. J. Ex. 13; *Braine v. Hunt* (1834), 2 Dowl. 391; *Ramaden v. Conry* (1839), 2 Ir. L. R. 175; *Molloy v. McDermott* (1850), 2 Ir. Jur. O. S. 82.

away a large portion of them through want of watching.²⁰ But a sheriff was allowed to interplead, when it appeared that he had delivered the goods to the claimant, with the consent of the execution creditor, under an arrangement by which the claimant if unsuccessful was to deliver the goods or pay their value.²¹

When sheriff has the proceeds.—A sheriff may interplead however, when he has sold the goods and still has the proceeds in his hands,²² or where he has the value of the goods, or the amount of the execution, the claimant having paid him out and taken the goods.²³ A sheriff may also interplead, where after a claim made he has sold the goods with the consent of both parties, and has the proceeds still in his hands.²⁴ When a claim is not made until after the goods have been sold by the sheriff, it is to be assumed that the proceeds in his hands represent their fair value.²⁵

Offer to pay value.—Relief will not be granted to a stakeholder, who has parted with the property, upon his undertaking to pay over its value to the party ultimately entitled, because it is not enough that the claimant may have the value of his property, he is entitled to it specifically.²⁶ So, the court will not interfere to relieve a sheriff, when the proceeds of goods levied on have been paid over, although he may be willing to bring a similar amount into court.²⁷

When paid before second claimant appears. — Interpleader will be refused, although the subject matter has been handed over before the second claimant appears, as where a sheriff sold and paid the proceeds to the execution creditor before he had notice of the adverse claim.²⁸

²⁰ *Wheeler v. Murphy* (1854), 1 Ont. Pr. 336.

²¹ *Cohen v. Burke* (1884), 1 N. S. Wales W. N. 144.

²² *Booth v. Preston* (1860), 3 Ont. Pr. 90.

²³ *Paris v. Walls* (1883), 10 Ont. Pr. 138; *Smith v. Critchfield* (1885), 14 Q. B. D. 873.

²⁴ *Darling v. Collatton* (1883), 10 Ont. Pr. 110.

²⁵ *Booth v. Preston* (1860), 3 Ont. Pr. 90.

²⁶ *Burnett v. Anderson* (1816), 1 Meriv. 405.

²⁷ *Inland v. Bushell* (1836), 5 Dowl. 147.

²⁸ *Scott v. Lewis* (1835), 4 Dowl. 259; 2 C. M. & R. 280; 1 Gale, 204; but see *Allen v. Gilby* (1884), 3 Dowl. 143.

When creditor withdraws sheriff. — Under an English rule, which is also in force in Ontario,²⁹ requiring the sheriff to withdraw, upon the execution creditor admitting the title of the claimant, it has been held that the sheriff cannot have relief when he has withdrawn. It was said that the effect of the rule on the sheriff, was to put him in a worse position than he occupied before, and that it seemed hard, when he had withdrawn on receipt of the notice of the execution creditor admitting the claimant's title, that he should not be able to get relief by an order of court directing that no action should be brought against him.³⁰ A subsequent amendment to the English rule now allows the sheriff to apply for protection after he has withdrawn;³¹ while an amendment in Ontario, says explicitly, that under such circumstances no action shall be brought against the sheriff.³²

Intention to seize.—Under the English Interpleader Act of 1831 a sheriff might interplead, when a claim was made to goods intended to be taken in execution, and the same provision exists in the present English and Colonial rules.³³

A sheriff who intends to levy, may therefore interplead in certain cases, although he has not made an actual seizure,³⁴ as when he makes several ineffectual attempts to levy, but does succeed in doing so.³⁵ A sheriff was allowed to interplead on an intention to seize, where the debtor had gone away and left his goods locked up in a house, the bailiff being in charge outside and watching to get in;³⁶ and also under a writ of possession, where the house in question was vacant, and the key in the possession of a third party, a mortgagee, who had notified the sheriff that

²⁹ Order LVII., Rule 16; Ont. Rule, 1115.

³⁰ *Moore v. Hawkins* (1895), 15 Reports, 357.

³¹ Rule 16 A.

³² Ont. Rule 1115.

³³ Eng. Order LVII., r. 1 (b); Ont. Rule 1103 (b).

³⁴ *Lea v. Rosale* (1855), 11 Ex. 13; *Day v. Carr* (1852), 7 Ex. 863; *Duncan v. Tees* (1885), 11 Ont. Pr. 66 and 296.

³⁵ *Lea v. Rosale* (1855), 11 Ex. 13.

³⁶ *Jolliffe v. Gilbert* (1891), Ont., the Master not reported.

he was in possession, and would hold against the plaintiff in the writ who was pressing the sheriff to execute.³⁷

It has been said, that in many cases the sheriff may be well justified in coming to the court, before he puts himself, by an actual seizure, under circumstances which might perhaps subject him not only to an action for the value of the goods, but also for damages for taking them,³⁸ and that cases may arise in which great injustice would be done, if the court will not interfere unless the sheriff has seized.³⁹

On the other hand it has been held, that the jurisdiction should be rarely exercised,⁴⁰ and that an order will not be made, unless the material shows the property or possession of the goods to be in the defendant, and hence that interpleader cannot lie when the goods are secreted and the sheriff cannot say where they are.⁴¹

The sheriff must show a *bona fide* intention of seizing, and cannot interplead when there is no physical difficulty in the way of taking possession;⁴² nor can he have relief when he has withdrawn upon a claim being set up, for in such a case he does not come to the court intending to take the goods.⁴³

In Pennsylvania it was provided⁴⁴ that a sheriff might interplead, when any goods or chattels were "entitled" to be taken in execution, and hence that the sheriff might come to the court before he had made an actual levy.⁴⁵ It was suggested that this course was proper when the goods were in the possession of the claimant,⁴⁶ and that the claimant had no right to insist that there should be a levy, although

³⁷ Hall v. Bowerman (1900), 19 Ont. Pr. 268.

³⁸ Day v. Carr (1852), 7 Ex. 883.

³⁹ Lea v. Rossie (1855), 11 Ex. 13; 24 L. J. Ex. 280; 1 Jur. N. S. 384.

⁴⁰ Lea v. Rossie (1855), 11 Ex. 13; Ogden v. Craig (1884), 10 Ont. Pr. 378.

⁴¹ Ogden v. Craig (1884), 10 Ont. Pr. 378.

⁴² Goslin v. Tune (1846), 2 Upper Canada Q. B. 177.

⁴³ Holton v. Guntrip (1837), 6 Dowl. 130; 3 M. & W. 145.

⁴⁴ Act of 10th April, 1848.

⁴⁵ Phillips v. Reagan (1874), 75 Pa. St. 381.

⁴⁶ Zacharias v. Tolton (1879), 90 Pa. St. 286.

the execution plaintiff might so insist for his own security.⁴⁷ In the codification of 1897 this provision seems to have been omitted.⁵

Goods taken from claimant.—The circumstance, of the goods being seized in the possession of the claimant, a stranger, and not in the possession of the execution debtor, does not prevent the sheriff from interpleading.⁴⁸ It has been said in Ontario, that interpleader orders should be granted with extreme caution, and only after strong presumptive evidence of the goods being the debtor's, which should ordinarily appear by his being in possession, by an affidavit of the belief of the sheriff, if he has such belief, and by a similar affidavit from the execution creditor.⁴⁹

A sheriff is not liable to an execution creditor, for not seizing goods in the possession of a claimant, and in such a case he does not require relief by interpleader.⁵⁰ It is now provided in Ontario that a sheriff shall not be obliged to seize property in the possession of a third party claiming the same, and not in the possession of the debtor, until the sheriff has been furnished with written instructions specifying the goods, and a bond as security for his own and the claimant's costs and expenses, and further that this shall not limit the sheriff's right to apply for relief by interpleader.⁵¹

Goods in custody of the law.—A sheriff cannot interplead, when he takes the goods from the possession of a landlord's bailiff,⁵² nor when they are seized in the possession of an assignee, or trustee in bankruptcy,⁵³ nor when they are seized while in the possession of a receiver appointed in an action in an Exchequer Court, where they con-

⁴⁷ *Phillips v. Reagan* (1874), 75 Pa. St. 391.

⁴⁸ Pa. P. L. 80 of 26 May, 1897.

⁴⁹ *Allen v. Gibbon* (1833), 2 Dowl. 202; *Ogden v. Craig* (1884), 10 Ont. Pr. 378; *Ford v. Baynton* (1832), 1 Dowl. 357; but see *Barker v. Dynes* (1832), 1 Dowl. 169.

⁵⁰ *Duncan v. Tees* (1885), 11 Ont. Pr. 66 and 296.

⁵¹ *Ogden v. Craig* (1884), 10 Ont. Pr. 378.

⁵² R. S. Ont., 1897, c. 77, s. 22.

⁵³ *Craig v. Craig* (1877), 7 Ont. Pr. 209.

⁵⁴ *K. Bell v. The East Anglian Railway Company* (1850), 3 Mac. & G. 104; *McMaster v. Meakin* (1877), 7 Ont. Pr. 211.

sist of a ship and its furniture,⁵⁴ because they are in the custody of the law, and cannot properly be taken.⁵⁵

Nor will interpleader be allowed to a common carrier, when the goods which were in its possession have been seized by an officer of the law under legal process.⁵⁶

In Ontario, under a special statute, a sheriff may interplead when he takes the goods from the custody of a Division Court bailiff.⁵⁷

Interest on the fund.—A person seeking relief by way of interpleader, should offer to pay into court, interest on the fund, if claimed.⁵⁸ If a stakeholder refuse to pay over a fund, because of a double demand, and do not then commence interpleader proceedings, but holds the fund, and does nothing until sued, he can then only obtain relief by paying the principal with interest up to the time of payment.⁵⁹ Interest is not estopped by a bill of interpleader improperly filed.⁶⁰ Where a stakeholder offered to pay the money, if indemnified, and on being refused, filed a bill of interpleader with proper diligence, it was held that he should not be charged with interest upon the money deposited in court.⁶¹ When the full amount of the fund is deposited in court, the applicant will be relieved of interest subsequently accruing.⁶² To relieve himself, therefore, from interest, the applicant must pay the fund into court, merely expressing a willingness to do so in his answer when sued by one of the claimants, is not sufficient, he will then be chargeable with interest.⁶³ In a Massachusetts case, where

⁵⁴ *Williamson v. Bank of Montreal* (1899), 6 British Columbia, 486.

⁵⁵ But see *Tooke v. Finley* (1821), Rowe Rep. 426.

⁵⁶ *Merchants' Bank v. Peters* (1884), 1 Man. 372.

⁵⁷ *Pardee v. Glass* (1886), 11 Ont. 275.

⁵⁸ *Spring v. S. C. Insce. Co.* (1823), 8 Wheat. U. S. 268; *Bignold v. Audland* (1840), 11 Sim. 23; *Australian v. Broadbent* (1877), 3 Victorian L. R. 138; *Feldman v. Grand Lodge A. O. U. W.* (1892), 46 N. Y. St. Repr. 122.

⁵⁹ *Sibley v. Equitable Life* (1888), 56 N. Y. Supr. Ct. 274.

⁶⁰ *Michigan v. White* (1880), 44 Mich. 25.

⁶¹ *Richards v. Salter* (1822), 6 Johns. Chy. N. Y. 445.

⁶² *Lambert v. Penn Mutual Ins. Co.* (1896), 50 La. Ann. 1027.

⁶³ *Hayden v. Saddlery* (1888), 3 Ohio Circuit Cts., 67, 71; *Port Clinton v. Clevestone* (1896), 10 Ohio Circuit Cts., 1, 6.

one claimant contended that he was entitled to interest upon the money, during the time he had been deprived of it, the court held, that as the bank which was seeking interpleader, had held the money ready to pay it to which ever of the claimants was entitled, the facts did not show that the bank should be compelled to pay interest.⁶⁴ A person seeking relief should not only offer to pay the fund into court, but he should take care to have an order passed to that effect, if he desires to protect himself from the liability for interest on the fund while it is in his possession.⁶⁵

Interest between the claimants.—As between the claimants, the successful one is entitled to the money out of court, but not to the interest which would have been earned between the date of payment in and judgment. The unsuccessful party is not liable for this, because he is not responsible for the interpleader. If he had sued the stakeholder and had recovered, he would properly have been entitled to interest up to the time of judgment, but failing to recover would be liable only for costs.⁶⁶ When goods levied upon by a sheriff are sold, and the proceeds remain in court, or in the sheriff's hands, pending the trial of the interpleader issue, the execution creditor who succeeds in the issue, is only entitled to interest upon his judgment up to the time the money was realized by the sheriff. This question arose in a contest between execution creditors, where the fund was not sufficient to satisfy all.⁶⁷ Upon the trial of an issue, one party claimed from the other, interest over and above the amount brought into court by the stakeholder, but it was held, that upon such an issue, interest could not be allowed, as the maximum amount to be recovered had already been settled and fixed by the interpleader order, under which it had been paid in.⁶⁸

⁶⁴ *Union Savings Bank v. Pool* (1887), 143 Mass. 203.

⁶⁵ *Williams v. Walker* (1846), 2 Rich. Eq. 291 S. Ca.

⁶⁶ *Clinton v. First National Bank* (1890), 103 Wis. 117.

⁶⁷ *Burnham v. Walton* (1885), 3 Man. 204; overruling *Wolff v. Black* (1884), 1 Man. 243.

⁶⁸ *Kinney v. Hynds* (1896), 49 Pac. 406; 53 Pac. 1081, Wyo.

CHAPTER IV.

THE CLAIMANTS.

All claimants should be brought in.—The person seeking protection through interpleader, should always be careful to bring before the court all claimants from whom he anticipates trouble, and who have made claims upon him in respect of the property in dispute.¹ It is one of the first principles of all judicature that, whenever there is a dispute as to the right to property, or its value, all the parties interested therein should be before the court, in order that the matter may if possible be finally settled and complete justice done.²

The applicant should remember, that a person not a party to the proceedings is not bound by them, and may still have his remedy by suit against a stakeholder, or a sheriff, for his property.³ The plaintiff, in a bill of interpleader, who leaves another party unprotected, by not bringing him in, and thereby renders necessary the filing of another bill, may not be allowed his costs.⁴ The defendants to a bill of interpleader, cannot object that, a third party is not made defendant as well, when the absence of such third party cannot affect their rights.⁵

¹ *Leavitt v. Fisher* (1854), 4 Duer. N. Y. 1; *Hastings v. Cropper* (1867), 3 Del. ch. 165.

² *Credits Gerundouse v. Van Weede* (1884), 12 Q. B. D. 171.

³ *Bain v. Lyle* (1871), 68 Pa. St. 60; *Burleigh v. England* (1838), 1 Arnold 106; *Reynolds v. Aetna Life Ins. Co.* (1896), 6 App. Div. 254 N. Y.

⁴ *Palmer v. Elliott* (1845), 4 Edw. Chy. N. Y. 643.

⁵ *Gibson v. Goldthwaite* (1845), 7 Ala. 281.

It has been held in Alabama that, if a defendant do not notify a third party claiming, that he is being sued, he waives the protection of the statute which allows interpleader, and is remitted to his common law liability as bailee; and his surrender of the property to the plaintiff under his judgment in the suit, is no protection to a subsequent action by his bailor the third party.⁶

The number of claimants.—The number of the claimants is only limited by the number of claims which have been made, and it is accordingly no objection that a bill of interpleader should be against a great number of persons.⁷ Where a man and woman made a deposit in a bank, to be repaid to either of them, and the man having died, three parties claimed the fund, the man's executor, his wife's administrator, and the woman the surviving depositor, it was held a proper case for interpleader, as the only way by which in one proceeding the court could end the whole controversy and determine who should receive the fund.⁸ There must always be two claimants, and if one withdraws, interpleader will be refused.⁹

Under British Statutes.—In England, under the present statutory provisions, relief by interpleader may be granted when the person seeking relief is or expects to be sued by two or more persons making adverse claims;¹⁰ or when a debtor, trustee, or other person, liable in respect of a chose in action, has had notice that an assignment of it is disputed by the assignor, or any one claiming under him, or of any other opposing or conflicting claims to the debt or chose in action.¹¹ In Ontario, and in other jurisdictions where the English rules have been adopted, the same practice prevails. Under these provisions the applicant must make parties, all persons bringing forward claims.¹²

⁶ *Powell v. Ledyard* (1884), 76 Ala. 423; *Nelson v. Gorgee* (1850), 34 Ala. 563.

⁷ *Angell v. Hadden* (1808), 15 Ves. Jun. p. 245.

⁸ *People's Savings Bank v. Look* (1893), 95 Michigan 7.

⁹ *Sodeau v. Shorey* (1896), 74 Law Times 240.

¹⁰ English Order LVII., r. 1 (a).

¹¹ 38 & 37 Vict. Imperial, c. 63, s. 25 (6).

¹² English Order LVI., r. 14, Ont. Rule 1117.

United States Codes.—In the United States, under the various State codes which allow a defendant, who has been sued by one of the claimants, to apply for relief by interpleader, the defendant makes parties to his application the plaintiff or plaintiffs who are suing him, and all the third parties who also lay claim to the subject of the suit; and where an action of interpleader is allowed, as it is in some States, the plaintiff makes defendants all parties who have brought forward claims.¹³

In sheriff's cases.—A sheriff, under the English and similar systems, charged with the execution of process, may interplead when a claim is made by any person other than the person against whom the process issued.¹⁴ This means that, he makes parties to his application the execution creditor, and the person or persons who are strangers to the writ and who make claims.

In Pennsylvania, all parties making claim to the goods levied upon, should be called before the court;¹⁵ and now by statute, the sheriff must give notice to the claimant, to both the plaintiff and the defendant in the execution, and also to the person who was in possession when the levy was made.¹⁶

Claimant himself appearing.—Upon a summary application under an interpleader statute, the court may allow a new claimant to come forward of his own motion, and will hear him although he has not been notified.¹⁷ In an earlier decision, it was said, in a sheriff's case, that the object of the Act is to give protection to the sheriff, against all those from whom he requires to be protected, and who are called upon by the rule to appear.¹⁸

Upon a bill of interpleader, a further claimant may,

¹³ *Leavitt v. Fisher* (1854), 4 Duer, N. Y. 1; *Hastings v. Cropper*, (1867), 3 Del. ch. 161.

¹⁴ English Order LVII., r. 1 (b); Ont. Rule 1108 (b).

¹⁵ *Van Winkle v. Young* (1860), 37 Penn. St. 214.

¹⁶ Pa. Act of 1897. See Appendix.

¹⁷ *Ibbotson v. Chandler* (1841), 9 Dowl. 250.

¹⁸ *Clarke v. Lord* (1833), 2 Dowl. 55.

upon his own petition, be made a party to the suit, and an order will be made permitting him to appear.¹⁹

Sheriff's cases in Ontario.—In Ontario, where there is no priority among execution creditors, the sheriff makes parties to his application all the execution creditors who have executions in his hands, whether from the High Court or from the County Court.²⁰ He also brings in any Division Court creditors having writs against the same goods, although these are not in the sheriff's hands. What his duty with regard to these last mentioned creditors may be, is not made plain, as their writs do not bind the goods unless there has been an actual seizure by the Division Court bailiff.²¹ The sheriff also brings in creditors who have executions against the debtor's lands only, when he has seized goods, under another creditor's writ against goods.²²

In Ontario, under a special provision, the court has discretion, upon a sheriff's interpleader, to allow other creditors, who desire to take part in the contest, a reasonable time in which to place their executions in the sheriff's hands, so that they may join in the proceedings, upon such terms as to costs and otherwise as may be just and reasonable.²³

Meaning of term 'claimants.'—Claimants, under the English practice, mean, all parties to the proceedings, and not merely claimants in the more restricted sense, as opposed to execution creditors in sheriff's cases.²⁴ But, a claimant who sues one of the other claimants, and does not make any claim against the stakeholder directly, is not a person who can be made a party to the interpleader proceeding.²⁵

Duty of claimant.—It is the duty of a claimant, when an interpleader is applied for, to take his position squarely,

¹⁹ *Wineman v. Lillibridge* (1896), 75 N. W. Rep. 617, Mich.

²⁰ Rules 1117, 1118 and 1119.

²¹ *Culloden v. McDowell* (1859), 17 Upper Canada Q. B. 350;

Watts v. Howell (1861), 21 Upper Canada Q. B. p. 250.

²² R. S. Ont. 1897, c. 78, s. 4 (7).

²³ R. S. Ont. 1897, c. 78, s. 4 (5).

²⁴ *Lyon v. Morris* (1887), 19 Q. B. D. p. 148.

²⁵ *Australian Mont de Piete Co. v. Ward* (1885), 11 Victorian L. R. 708.

with respect to the nature of his claim, and either to stand upon his right to the money in question, in which event an interpleader will be granted, or to withdraw the assertion of the claim, and thus to relieve the applicant of the necessity of bringing him in.²⁶ The claimant in a sheriff's case must specify the goods which are claimed by him.²⁷

The Crown.—That the Crown might not be a claimant under the English Interpleader Act, was decided at common law, for the curious reason, that, under the Act the court could award costs, which it will never do against the Crown.²⁸ In an early Canadian case, a sheriff was refused relief, where goods levied on were claimed by the Crown, because, as was stated, a claim by the Crown could not be barred, and consequently an order would be useless.²⁹

The English rule in equity was different. Where holders of a fund found it claimed by the Crown and by a railway company, they filed a bill of interpleader. It was opposed by the Crown, on the ground that there was no precedent for the Crown being called upon to interplead. The Vice-Chancellor in giving judgment said: If the Crown was adversely claiming against the stakeholders, they had a right, when other persons were also claiming the same money, to file a bill of interpleader, and to make the Crown a defendant to the bill, because the Crown was one of the parties who were vexing them. He should not hold that the Crown was an improper party, and made a decree that the Crown and the railway company should interplead.³⁰

There being clearly a conflict or variance, between the Rule of Equity and the Rule of Common Law on this point, the Rule of Equity must prevail under the English practice.³¹ The Ontario Rules relating to Crown actions provide, that the procedure and forms, for the protection of

²⁶ *Butler v. Atlantic Trust Co.* (1889), 59 N. Y. S. 814.

²⁷ *Price v. Plummer* (1878), 26 W. R. 45.

²⁸ *Candy v. Maugham* (1848), 1 D. & L. 745.

²⁹ *McGee v. Baines* (1857), 3 Upper Canada L. J. O. S. 151.

³⁰ *Reid v. Stearn* (1890), 4 Jur. N. S. 267; and see *Errington v. The Attorney-General* (1731), Bunb. 308.

³¹ Eng. J. A. 1873, s. 25 (11); R. S. Ont. 1897, c. 51, s. 59 (13).

claims to property, between subject and subject, shall be used in like cases, for the protection of claims, which her Majesty may have against any person for any property.³²

The United States.—The United States may be a claimant in interpleader, and it is proper to substitute the United States as defendant in the applicant's place, when the other claimant has sued.³³

Husband and wife.—It would seem that a wife may be an adversary claimant, when husband and wife have separate property rights.³⁴ Relief has been awarded in the following cases: Where a woman, while unmarried, deposited money with bankers, and afterwards sued them for it, a third party also claimed the money, alleging that he was the woman's husband, which she disputed;³⁵ and where a married woman lodged a sum of money in a bank in her own name, representing herself to be a widow, and her husband and a transferee from her both claimed.³⁶ It is a frequent occurrence in sheriff's cases, for interpleader orders to be made when goods seized under process against the husband are claimed by the wife.³⁷

The Massachusetts Code provides, that a defendant may interplead when the subject of the suit is claimed by another party than the plaintiff, whether by the husband or wife of the plaintiff, or otherwise.³⁸

In Ontario, when any question arises between husband and wife, as to the title or possession of property, any corporation, company, public body, or society, in whose books any stocks, funds, or shares, of either party are standing, may apply by summons or otherwise in a summary manner to a judge, who may make such order with respect to the

³² Ont. Rule 238.

³³ *Johnston v. Stimmel* (1882), 26 Hun. N. Y. 435.

³⁴ *Miller v. Peck* (1881), 18 W. Va. 75; *Koppinger v. O'Donnell* (1889), 16 Rhode Id. 417.

³⁵ *Crellin v. Leyland* (1842), 6 Jur. 733.

³⁶ *Costello v. Martin* (1867), 15 W. R. 548.

³⁷ *Bird v. Holt* (1861), 30 L. J. Ex. 318; *Shingler v. Holt* (1861), 7 H. & N. 65; 30 L. J. Ex. 322; *Farley v. Pedlar* (1901), 21 Canadian L. T. 294; 1 Ont. 570.

³⁸ Mass. Act of 1896, c. 281.

property in dispute, and as to the costs, as he thinks fit, and any person so applying shall be treated as a stakeholder only.³⁹ Prior to the Married Woman's Property Act, when a married woman claimed goods seized by a sheriff, and the latter applied for an interpleader order, it was necessary that the husband should be served, and an order would not be made in his absence.⁴⁰

Children.—Where it was admitted that certain life insurance moneys belonged to all the children of the same parents, the plaintiffs sued for the money claiming to be the only lawful children, while another child who claimed, was alleged not to have been born in lawful wedlock, it was held a case for interpleader.⁴¹

Executor or administrator.—The representative of a deceased person cannot be a claimant, until he has been appointed administrator,⁴² or, on the same principle, if there is a will, until as executor he has taken out probate.⁴³

Trustee.—A trustee may be a claimant, and the claim of a trustee of a settlement will not be defeated because of the non-joinder of a co-trustee;⁴⁴ sometimes the *cestui que trust* is added along with a trustee claimant.⁴⁵

Cestui que trust. — A *cestui que trust* in possession of goods, has a sufficient interest in them to maintain a claim, in an interpleader issue, without joining the trustee in whom the legal estate is vested.⁴⁶ Interpleader has also been allowed where money deposited in a bank by a trustee in the name of his *cestui que trust*, was demanded by both.⁴⁷

An infant.—An infant party may maintain a claim sufficient to found an interpleader. Thus, a sheriff has been held entitled to an interpleader order, although the claimant was

³⁹ R. S. Ont. 1897, c. 163, s. 19.

⁴⁰ *Gourlay v. Ingram* (1869), 2 Ont. Chy. Chamb. 237.

⁴¹ *Koenig v. N. Y. Life* (1888), 14 N. Y. St. Rep. 250.

⁴² *Pashley v. White* (1881), 38 L. J. Pa. 52.

⁴³ *Burke v. Rutledge* (1851), 3 Ir. Jur. O. S. 148.

⁴⁴ *Bradley v. James* (1876), 10 Ir. R. C. L. 441.

⁴⁵ *Leedom v. Zierfuss* (1888), 3 Del. Pa. 129.

⁴⁶ *Schroeder v. Hanrott* (1873), 28 L. T. N. S. 704; *Connell v. Hickock* (1898), 15 Ont. App. 518.

⁴⁷ *Rahway Savings Institution v. Drake* (1874), 25 N. J. Eq. 220.

an infant. It was said, that if there was any difficulty, it was one which arose between the litigant parties.⁴⁸ It is only when the infant claimant becomes an actor, that a next friend is necessary, as when he becomes plaintiff in the issue directed.⁴⁹

Religious society.—Where a trust was created for the benefit of an incorporated religious society, and there were two bodies, each claiming to be such society and so entitled to the trust property, interpleader was allowed.⁵⁰

A receiver.—An official receiver may be a claimant, thus, where a certificate of deposit was claimed from a bank by a receiver appointed at the instance of the depositor's creditors, and also by a present holder, who took it after the receiver had been appointed, the bank was allowed to interplead.⁵¹

Assignee in insolvency.—An assignee in insolvency, or under a bankrupt act, or a trustee under a deed of assignment for the benefit of creditors, may be claimants in interpleader.⁵²

A sheriff.—A sheriff who has attached the subject matter in the hands of the stakeholder, should be brought in as a claimant, when a third party has made an adverse demand;⁵³ but, when a sheriff holds attachments against property which is involved in an action of interpleader, it has been held that he has no interest, and is not a necessary party.⁵⁴

A creditor.—When a debtor is seeking relief by way of interpleader, it is proper to make his own creditor a party claimant, as well as parties claiming to be creditors of his own creditor.⁵⁵ But, it has been held, that before a creditor

⁴⁸ *Claridge v. Collins* (1839), 7 Dowl. 698; 3 Jur. 494; *Emerson v. Humphries* (1862), 15 Ont. Pr. 84.

⁴⁹ *Grant v. McKay* (1894), 10 Man. 243; 14 Canada L. T. 296.

⁵⁰ *First Presbyterian v. First Presbyterian* (1874), 25 Ohio St. 123.

⁵¹ *James v. Sams* (1892), 90 Ga. 404; see also *Purkiss v. Holland* (1887), 31 Sol. J. 702.

⁵² See chapter XI.

⁵³ *Simons v. Hearn* (1892), 44 N. Y. St. Rep. 767; but see *Merchants Bank v. Petres* (1884), 1 Man. 372.

⁵⁴ *Snyder v. Bliss* (1882), 19 Weekly Dig. N. Y. 304.

⁵⁵ *Bell v. Gunn* (1894), 21 S. E. Rep. Ga. 899.

can be a claimant, he must have taken proper steps to establish the legal existence of the debt owing to him.⁵⁸

In the Scotch process of multiplepoinding, a creditor has no title to claim funds in dispute, as to which his debtor has right, except by way of a riding claim upon a claim lodged by his debtor.⁵⁷

Execution debtor.—The execution debtor may be a claimant on a sheriff's application, when he claims the property levied on, not in his own right, but as a trustee for another, notwithstanding he is the person against whom the process issued;⁵⁹ otherwise he has no right to be heard, because the result can establish nothing to affect his interest.⁶⁰ Where an execution debtor claimed to set off a judgment, which he had recovered against the execution creditor, it was held not to be such a claim as entitled the sheriff to relief.⁶⁰ But where the execution creditor has been paid the amount of his execution, and a balance remains, the debtor may be a claimant in respect of such balance.⁶¹ In Pennsylvania the debtor is made a party as a matter of course.⁶²

When the debtor claims the goods seized, as his exemptions, the sheriff cannot interplead. It has been said by the Court of Appeal in Ontario, that the sheriff in seizing exemptions does a wrongful act, he acts at his peril in granting or refusing exemptions, and the Legislature has not thought proper either from inadvertence or designedly to extend to him the right to interplead in such a case.⁶³ The Manitoba and North-West Territories Rules provide

⁵⁸ *Hines v. Sprulli* (1838), 2 Dev. & B. N. Carolina 98; *Venable v. N. Y. Bowery Life Insurance Co.* (1882), 49 N. Y. Sup. Ct. 481.

⁵⁹ *Gill's Trustee v. Patrick* (1889), Ct. of Session, 16 B. 403.

⁶⁰ *Fenwick v. Laycock* (1841), 2 Q. B. 108; 6 Jur. 641; *Philby v. Ikey* (1. 33), 2 Dowl. 222; *Lewis v. Elcke* (1874), 2 Dowl. 337.

⁶¹ *McNider v. Baker* (1864), 10 Upper Canada L. J. O. S. 103.

⁶² *Smith v. Saunders* (1877), 37 L. T. 359.

⁶³ *Ormsby v. Wight* (1893), 27 Ir. L. T. R. 134; *Warnock v. Leslie* (1882), 10 Ir. R. C. L. 68.

⁶⁴ See Appendix.

⁶⁵ *Gould v. Hope* (1893), 20 Ont. App. 347; but see *Central Bank v. Hodgson* (1887), 23 Upper Canada L. J. 194; *De Mill v. McTavish* (1894), 14 Canada L. T. 287.

that a sheriff may interplead, when the debtor claims that the goods levied on are exempt from seizure.⁶⁶

A partner.—When a partner claims goods belonging to his firm, which a sheriff has seized under an execution against another of the partners for such partner's individual debt, interpleader will not lie, unless the execution creditor disputes the partnership, the sheriff should seize and sell only the debtor's interest.⁶⁵ A solicitor who has been employed by one member of a firm, after its dissolution, to collect a debt, and which when collected is claimed adversely by the partners, may have relief.⁶⁶

An agent.—Where one claimant sued in his own name, for another person, it was held proper to make both such parties defendants, along with the other claimant.⁶⁷

Tax collector in Ontario.—In Ontario, after an interpleader order is made, the sheriff cannot recognize the claim of a tax collector for resident taxes, and if he pay them he will have to account for the money so paid;⁶⁸ but it would seem that if the taxes are payable by a non-resident, it would be otherwise.⁶⁹

Foreign claimants—English practice.—A bill of interpleader will lie in equity, although one of the parties who claims the property is a foreigner, and may never come within the jurisdiction;⁷⁰ and if a claimant out of the jurisdiction do not appear, the subject matter will be delivered to the claimant within the jurisdiction.⁷¹

Since the English Interpleader Act was enacted in 1831, and under the present rules, it has been the practice to make interpleader orders although one claimant is a foreigner

⁶⁶ See Appendix.

⁶⁷ *Holmes v. Mentze* (1835), 4 Dowl. 800; 4 A. & E. 127; *Anon* (1875), W. N. 204; *Ovens v. Bull* (1876), 1 Ont. App. R. p. 60; *Blackburn v. Wagner* (1889), 15 Victorian L. R. 583; but see *Went v. Pashley* (1879), 9 W. N. C. Pa. 550.

⁶⁸ *Perkins v. Trippe* (1869), 40 Ga. 225.

⁶⁹ *Bell v. Hunt* (1848), 3 Barb. Chy. N. Y. 391.

⁷⁰ *Maclean v. Anthony* (1884), 6 Ont. 330.

⁷¹ *Adamshead v. Grant* (1867), 4 Ont. Pr. 121.

⁷² *Martinus v. Helmuth* (1815), 1 Coop. 245.

⁷³ *Stevenson v. Anderson* (1814), 2 Ves. & B. 410.

residing out of the jurisdiction.⁷³ Service should be effected in such manner as is directed by the law of the domicile of the foreign claimant.⁷⁴ The same practice prevails in Ireland,⁷⁵ in Australia,⁷⁶ in Canada,⁷⁸ and in Scotland in the corresponding process of multiplepoinding.⁷⁷

In a recent English decision, the law on the subject has been thus summarized:—Interpleader will lie, although one claimant is a foreigner. It is not a fatal objection, that the court would have no authority to enforce any order which might be made against him. The service of an interpleader summons merely informs him of the proceedings which are being taken, so that, if, after such notice, he should decline to submit to the jurisdiction of the court, and allow the rights as between a plaintiff and a defendant to be determined in his absence, and thereafter commence an action against the defendant in respect of the same claim, he would be barred from continuing proceedings which would be harassing upon the defendant, who would thereby be twice vexed for the same cause.⁷⁸ The foreign claimant is not liable to English law, to any further extent than his position as claimant enables the court to impose upon him an interpleader issue.⁷⁹ The fact that one claimant is out of the jurisdiction, is no ground for rejecting the application, although it may be a reason for making him give security for costs, or having him barred altogether.⁸⁰

⁷³ *Attenborough v. London & St. Katharines Dock Co.* (1878), 3 C. P. D. p. 454; *Belmonte v. Aynard* (1879), 4 C. P. D. 221, 352; *Van der Kan v. Ashworth* (1884), W. N. 58; *Credits Gerundense v. Van Weede* (1884), 12 Q. B. D. 171; *Eschger v. Morrison* (1890), 6 T. L. R. 145; but see *Patroni v. Campbell* (1843), 12 M. & W. 277.

⁷⁴ *Van der Kan v. Ashworth* (1884), W. N. 58.

⁷⁵ *Keane v. Crozier* (1893), 27 Ir. L. T. R. 81; *City of Dublin v. Cooper* (1899), 2 Ir. R. 381.

⁷⁶ *Union Bank v. Tuttle* (1889), 15 Victorian L. R. 258.

⁷⁷ *Farr v. O'Neill* (1895), 15 Canada L. T. 390 (Ont.); *Edwards v. Edwards* (1888), 12 Ont. Pr. 583; but see *contra Re Mutual Life* (1899), 19 Canada L. T. 362 (Nova Scotia).

⁷⁸ *North British Railway Co. v. White* (1881), Ct. of Session, 9 R. 97.

⁷⁹ *Credits Gerundense v. Van Weed* (1884), 12 Q. B. D. 171.

⁸⁰ *Eschger v. Morrison* (1890), 6 T. L. R. 145.

⁸¹ *Attenborough v. London & St. Katharine's Dock Co.* (1878), 3 C. P. D. p. 454.

It is a recognized fact that, a difficulty exists in upholding the practice, in the absence of any rule or statute expressly permitting it, and in the face of the limitations placed upon the service of process upon foreigners. It has been said that, service out of the jurisdiction is an interference with the ordinary course of the law, for generally courts exercise jurisdiction only over persons who are within the territorial limits of their jurisdiction. If an Act of Parliament gives them jurisdiction over subjects wherever they may be, such jurisdiction is valid, but apart from a statute, a court has no power to exercise jurisdiction over any one beyond its limits. It has accordingly been pointed out, that the decisions on this point, may perhaps be supported, on the ground that the object of service is not to give jurisdiction over the party served, but only to give him notice of a proceeding affecting his rights, so that he may, if he please, come in and defend them.⁸¹ This view has not always been considered sound, for notice of interpleader proceedings asserts an absolute right, in the tribunal which gives the notice to deal as it chooses with the property to which the interpleader relates.⁸²

An applicant, who resided in New Jersey, and owed a debt payable in Michigan, to parties living in Detroit, and from whom the debt was also claimed by parties living in Ontario, was refused relief upon his applying for it in Ontario, because the debt, or subject matter was not within the jurisdiction.⁸³

Statute in Ontario.—In Ontario, in 1897, a rule was enacted, which provides that the court may allow service out of the jurisdiction, of a notice of motion in interpleader proceedings.⁸⁴ In exercising a discretion under this provision, the courts will only allow service, if it appears that the case is one in which it is proper to bring in a foreign claimant, as where the subject matter or debt is at home,

⁸¹ *Re Busfield* (1886), 32 Ch. D. p. 181.

⁸² *Foote's Private International Law*, 2nd Ed., p. 229.

⁸³ *Re Benfield and Stevens* (1897), 17 Ont. Pr. 300 & 339.

⁸⁴ *Rule 162* (3).

and there is some danger of the foreign claimant suing within the jurisdiction.⁸⁵ If the subject matter is abroad, and the foreign claimant has no intention whatever of suing the stakeholder in Ontario, the latter will not be allowed to serve a notice out of the jurisdiction.⁸⁶

It has been held in Ontario that, when a foreign claimant has brought a foreign stakeholder into the jurisdiction through an action, and the stakeholder then interpleads in that jurisdiction, the foreign claimant cannot then object to the interpleader on the ground that he is a foreign claimant, the documents of title forming the subject of interpleader being also within the jurisdiction.⁸⁷

Practice in United States.—The same practice prevails in the United States, of allowing service in interpleader proceedings upon claimants outside the jurisdiction of the court. It has been said that, the beneficial operation of the sheriff's Interpleader Act in Pennsylvania would be much impaired, if the order of the court could not reach absent claimants;⁸⁸ but equity will not decree an interpleader as to parties outside the jurisdiction until they have been served.⁸⁹ Such cases arise most frequently, when the claimants reside in different States.⁹⁰ It has been held in Missouri, that, where a fund in the hands of an agent of the law, is claimed by two non-residents, and one of them makes a demand within the State, interpleader will lie.⁹¹

If, however, the foreign claimant has already commenced an action in a foreign court, it has been held in the United States, that interpleader will not lie, because the court in which relief is sought has no power to stay the action pending in the other court.⁹²

⁸⁵ *Re Confederation Life Assn.* (1900), 19 Ont. Pr. 16, 89.

⁸⁶ *Harris v. Bank of British North America* (1900), 19 Ont. Pr. 51.

⁸⁷ *Re Underfeed Stoker Co. of America* (1901), 1 Ont. 42.

⁸⁸ *Moore v. Lelar* (1850), 1 Phila. Pa. 72.

⁸⁹ *Kildare v. Armstrong* (1885), 18 W. N. C. Pa. 114.

⁹⁰ *Leonard v. Jamison* (1833), 2 Edw. Chy. N. Y. 136; *Barry v. Equitable* (1873), 14 Abb. Pr. N. Y. n. 385; *Whitridge v. Barry* (1874), 42 Md. 140; *Fitch v. Brower* (1886), 42 N. J. Eq. 300.

⁹¹ *Freeland v. Wilson* (1853), 18 Mo. 380.

⁹² *Orient v. Sloan* (1888), 70 Wis. 611; *Walsh v. Rhall*, 6 Kulp Pa. 483; but see *Barry v. Equitable* (1873), 14 Abb. P. R. N. Y. n. 385.

Landlord.—When a sheriff has seized goods, and the landlord makes a claim for rent, it is the sheriff's duty, under the English practice, on ascertaining that the rent is really due, to ask the execution creditor for it, and upon receiving the amount to satisfy the claim. If the creditor will not furnish the money, the sheriff may withdraw from possession.²³ If, instead of satisfying the claim, the sheriff interpleads, his application will be refused,²⁴ because the landlord's claim is not a claim to the chattels or their proceeds, as the property of the claimant;²⁵ but if the creditor disputes that the rent is owing an interpleader order will be made.²⁶

When an execution creditor pays the landlord rent in arrear, so that the sheriff may sell, the execution creditor is entitled to be repaid out of the proceeds of the goods, such advance as a salvager.²⁷

Where a writ of *fiery facias* had been executed, and a return made, but before the money was paid over to the execution creditor, the landlord of the debtor served a notice claiming a year's rent the sheriff was allowed to interplead.²⁸ A landlord cannot ordinarily be a claimant from a stakeholder, until a legal step by distress or otherwise is taken.²⁹

English Statute of 3 Anne c. 14 (1709).—It frequently happens upon a sheriff's interpleader, that in addition to the execution creditor and the adverse claimant, the landlord makes a claim for rent. As the landlord cannot distress when the goods are in the custody of the sheriff,¹ he has to fall back on the right which is given to him under

²³ *Cocker v. Musgrove* (1846), 9 Ad. & E. 223; *Locke v. McConkey* (1876), 26 Upper Canada C. P. 475; *Maclean v. Anthony* (1884), 6 Ont. 331.

²⁴ *Clarke v. Lord* (1833), 2 Dowl. 55; *Haythorn v. Bush* (1834), 2 Dowl. 641; 2 C. & M. 680.

²⁵ *Bateman v. Farnsworth* (1860), 29 L. J. Ex. 365.

²⁶ *Ontario v. Hobbs* (1888), 15 Ont. 440; *McLaughlin v. Hammill* (1892), 22 Ont. 493; *Tooke v. Finley* (1821), Rowe Rep. 426.

²⁷ *Warnock v. Leslie* (1882), 10 Ir. R. C. L. 68.

²⁸ *Nixon v. Wilks* (1859), 4 Ir. Jur. N. S. 242.

²⁹ *Rowland v. Powell* (1744), 1 Ridgew. 260.

¹ *McIntyre v. Stata* (1854), 4 Upper Canada C. P. 248; *Grant v. Grant* (1883), 10 Ont. Pr. 40.

the English statute of Anne,² which enacts: "that no goods or chattels whatsoever lying and being in or upon any messuage, lands or tenements, which are or shall be leased for life or lives, term of years, at will or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the said execution is sued out, shall, before the removal of such goods from off the said premises by virtue of such execution or extent, pay to the landlord of the said premises or his bailiff all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution, provided the said arrears of rent do not amount to more than one year's rent, and in case the said arrears shall exceed one year's rent, then the said party at whose suit such execution is sued out, paying the landlord or his bailiff one year's rent, may proceed to execute his judgment as he might have done before the making of the act, and the sheriff or other officer is thereby empowered and required to levy as well the money so paid for rent as the execution money."

Scope and effect of the Statute.—The statute of Anne only assists the landlord when the goods seized under an execution against the tenant belong to the latter, and not when they turn out to be the property of a third party. If the sheriff interplead, when a stranger claims the goods on the demised premises, seized by the sheriff under an execution against the tenant, and the landlord gives notice that rent is owing, and the stranger eventually establishes his title in the interpleader issue, the landlord cannot have his rent from the goods if they have been removed from the premises, nor from the proceeds if they have been sold. The reason for this, is, that notice by the landlord to the sheriff under the Statute of Anne is not equivalent to a distress, and a landlord can only distrain upon a stranger's goods while the goods remain upon the premises. The stranger has a perfect right to remove them at any time, or under

² 8 Anne, c. 14 (1709).

any circumstances, in order to avoid the distress, and if distress is prevented by the sheriff seizing and selling or removing, the goods are freed from the claim for rent.³

It follows, therefore, when goods are sold under an interpleader order by the sheriff and the proceeds are paid into court, that the whole proceeds should be paid in less the expenses of possession and sale, and the landlord will only be entitled to his rent, if the execution creditor succeeds in the issue, but if the stranger succeeds the latter will be entitled to the whole fund freed from the landlord's claim.⁴ Where, after the interpleader order had been made, the landlord claimed his rent, and the sheriff instead of obeying the order by paying the whole fund into court, paid the landlord out of it, and the claimant succeeded in the issue, the sheriff was compelled to repay the claimant the amount paid for rent.⁵

If an interpleader issue is directed, the sheriff withdraws from possession when security is given by the claimant, and the goods are then no longer *custodia legis*, and may be distrained upon by the landlord. But, if the security be not given, and the goods are sold, they are not sold under the execution, but by virtue of and under the authority of the order alone, and the sale is not, except in the event of the execution creditor succeeding, a sale within the Statute of Anne. When the sheriff interpleads, he ceases to be the bailiff of the landlord, as regards the goods seized, if they turn out not to belong to the tenant.⁶

Where, after an interpleader order has been made, the sheriff with the consent of the execution creditor and the claimant temporarily withdraws from possession, the goods are no longer in *custodia legis*, and the landlord may dis-

³ Clarke v. Farrell (1881), 31 Upper Canada C. P. 584; Beard v. Knight (1858), 8 E. & B. 865; Foulger v. Taylor (1860), 5 H. & N. 202; see also Lockart v. Gray (1866), 2 Can. L. J. 163.

⁴ Clarke v. Farrell (1881), 31 Upper Canada C. P. 584.

⁵ White v. Binstead (1853), 13 C. B. 304.

⁶ Clarke v. Farrell (1881), 31 Upper Canada C. P. p. 590, per Oiler, J.; Maclean v. Anthony (1884), 6 Ont. 331.

train upon them, although he knows that the interpleader proceedings are still pending.⁷

After an interpleader order had been made, and pending the trial of the issue, a landlord claimed his rent, and as the execution creditor would not furnish the rent the sheriff withdrew from possession, at the instance of the sheriff, the court made an order setting aside the issue and provided for his costs.⁸

After the trial of an interpleader issue, the sheriff is not entitled to a second interpleader to test a landlord's claim, when the claim for rent was made before the first application, and might have been brought up then.⁹

When landlord in possession.—A sheriff cannot interplead, when the goods in question, are, when seized, in the possession of a landlord's bailiff under distress for rent, for they are then in *custodia legis*, and cannot properly be taken.¹⁰ But where an execution creditor suggested fraud and collusion between the landlord and the debtor his tenant, the sheriff was awarded relief although the goods when seized were under distress.¹¹

It has been suggested in Ontario that, if the goods are a stranger's, the landlord's duty is to distrain even although taken by the sheriff, because if the goods are not the property of the execution debtor, the sheriff is a wrong-doer, and the goods are not in such a case protected by the execution.¹² If this rule is followed, certain difficulties arise, for how can the landlord determine at the outset whether the goods belong to the tenant who is the debtor, or to the stranger claiming them, as that is the very question to be tried on the issue; and how can the goods be distrained, if they are under seizure, and so in *custodia legis*?

It has also been said that, the right of the landlord to compel the sheriff to make the rent depends on the legality

⁷ Cropper v. Warner (1883), 1 C. & E. 152.

⁸ Lawson v. Carter (1894), W. N. 8.

⁹ Clarke v. Farrell (1880), 8 Ont. Pr. 234.

¹⁰ Craig v. Craig (1877), 7 Ont. Pr. 209.

¹¹ Tooke v. Finley (1821), Rowe Rep. 426.

¹² Clarke v. Farrell (1881), 31 Upper Canada C. P. p. 599, per Wilson, C.J.

of the seizure, and when the execution is against the stranger's goods, that is against the person who is not the tenant, and it turns out as a result of the interpleader contest that the goods are subject to the execution, and so do not belong to the tenant, the landlord will nevertheless in such case have his rent out of the stranger's goods.¹³

Claimant in dual capacity. — The same claimant may sometimes claim in a dual capacity. Thus, a sheriff was allowed to interplead where the goods levied on were claimed by the official assignee of an estate, and the same claimant was also assignee of another estate, and it appeared likely that a question would arise as to which estate would be entitled if the claimant succeeded.¹⁴ Where one of several execution creditors desired that the claimant in a sheriff's interpleader should succeed, but if the claimant should fail, that such creditor should participate with the others, it was held that such creditor was a proper party to the interpleader proceedings.¹⁵

Two claimants but no conflict.—If the two different claimants rely claim for and on behalf of the same person, there is no conflict, and interpleader will not lie.¹⁶

When new claimant appears.—When a new claimant appears, after an interpleader order has been made directing an issue, the issue may be amended by joining him as a party, and this whether the issue has been finally drawn up or not. Thus, where liquidation proceedings were commenced pending the trial, the trustee of the debtor was by amendment of the issue made a party. The judge who decided this said:—"It is admitted, that before the issue is finally drawn up parties may be added, that is every day practice. But it is said that they cannot be afterwards. I know of no such law, and it seems to me to be contrary to practice. An order for an interpleader issue does not itself decide the right of the parties. It leaves them to be de-

¹³ *Hughes v. Smallwood* (1890), 25 Q. B. D. 306.

¹⁴ *E. S. & A. C. Bank v. Gill* (1885), 2 N. S. Wales W. N. 103.

¹⁵ *Dundas v. Darvill* (1887), 12 Ont. Pr. 347.

¹⁶ *Capitol Fire Ins. Co. v. Consolidated Mfg. Co.*, 34 W. N. O. Pa. 81.

cided. To refuse to make this order would be giving effect to a technicality.¹⁷ A defendant in an interpleader suit was allowed to file a supplemental bill, to bring a new defendant before the court, without making the parties to the original suit parties to it, as a plaintiff in an ordinary suit might do, because after decree a defendant to an interpleader was said to stand in the anomalous situation of plaintiff as well as defendant.¹⁸

In the Scotch action of multiplepointing, new claimants are allowed in after the matter has been decided between the claimants at first competing, even after final decree, so long as the fund is still in court, but upon terms, and payment of the expenses incurred, which will not be available for the subsequent stages.¹⁹ A person who asks to enter at a late stage may have to pay all or a proportion of the expense incurred, if it can be shewn that his late appearance was caused by his own fault, or that he stood aside while other parties were fighting his battle and then seeks to benefit from their labours. But a claimant who was in Australia, and who did not know of the proceedings, and who claimed as a life tenant, was allowed in without expense, the prior claimant claiming the fee, no additional expense having been caused in his absence.²⁰

It frequently happens in sheriff's cases, before or after an interpleader order is made, that a new claimant appears and lays claim to the goods or their proceeds while still in the sheriff's possession; the court, if the sheriff has acted properly, will allow such new claimant to be brought in, and if an interpleader order has already been made, will make the necessary amendment.²¹ Where a sheriff had sold goods under

¹⁷ *Bird v. Mathews* (1882), 46 L. T. 512.

¹⁸ *Lyne v. Pennell* (1850), 1 Sim. N. S. 113.

¹⁹ *Geikie v. Morris* (1858), Ct. of Session, 20 D. (H. L.) 12; *Stodart v. Bell* (1860), Ct. of Session, 22 D. 1092; *Binnle v. Henry* (1883), Ct. of Session, 10 R. 1075; *Cowan's Trustee v. Cowan* (1888), Ct. of Session, 16 R. 17.

²⁰ *Sawers v. Sawers* (1880), Ct. of Session, 17 R. 1.

²¹ *Kirk v. Clark* (1835), 4 Dowl. 263; *Walker v. Ker* (1843), 12 L. J. Ex. 204; *Macdonald v. Great N. W. Central Ry.* (1894), 14 Canada L. T. 284; 10 Man. 88; *Bryce v. Kinnee* (1892), 14 Ont. Tr. 709.

an interpleader order, and had a surplus in his hands over the execution creditor's claim, an inferior court creditor claimed the surplus, and had the order amended by directing an issue between himself and the claimant to abide the result of the first issue, the order was made because all parties were before the court, and because it was said that if it had been dismissed, the sheriff might immediately have applied.²²

Substitution of new claimant.—A new claimant may be substituted, when a claimant already before the court desires to retire, and that, whether an interpleader order has already been made or not;²³ as where the new claimant paid off the claim of the first, and took the latter's position.²⁴

Claimant's position when relief refused.—When a sheriff's application is refused, the claimant cannot complain. It can do the claimant no possible harm, because it does not affect his title to the property, nor prejudice his right of action for the seizure.²⁵

²² Slater v. Cornish (1881), 1 Canada L. T. 133.

²³ Lydal v. Biddle (1836), 5 Dowl. 244; Laffin v. Suplee (1884), 17 W. N. C. Pa. 157; Pomeroy v. Cauley (1885), 42 L. J. Pa. 170.

²⁴ Black v. Drouillard (1877), 28 Upper Canada C. P. 107.

²⁵ Bain v. Funk (1869), 61 Pa. St. 185.

CHAPTER V.

THE CLAIMS.

Two adverse claims.—The foundation of the right to interpleader is the fact, that the person applying for relief has received a second claim adverse to or conflicting with another claim, previously made, to the same subject matter.¹

The foundation of multiplepounding in Scots law is the same. In the original conception of the process the proper ground was double distress in the strict sense of the term, or in other words competition created by rival diligence & execution. But in later times it has not been thought indispensable to have double diligence, but double claims to the same fund have been considered sufficient. It is still however necessary to the validity of the action, that there should be a true case of double claim to one fund or property on separate and hostile grounds, not a mere ostensible case got up in order to try a question of debt or obligation between two individuals, the proper mode of trying which is a direct action.²

The following have been held competing claims equivalent to double distress:—Money paid into a bank by an independent congregation for the erection of a chapel,

¹ *Davis v. Davis* (1895), 96 Ga. 136; *Brackett v. Graves* (1898), 30 App. Div. N. Y. 162; *Browning v. Watkins* (1848), 10 S. & M. (Miss.) 482; *Cahoon v. Levy* (1854), 4 Cal. 243.

² *Russel v. Johnston* (1859), Ct. of Session, 21 D. 286; *Moncrieff v. Bethune* (1844), Ct. of Session, 6 D. 1100; *Carmichael v. Todd* (1853), Ct. of Session, 15 D. 473; *Great North of Scotland Ry. v. Gauld* (1863), Ct. of Session, 1 Macph. 1063; *Connell's Trustee v. Chalk* (1878), Ct. of Session, 5 R. 375; *Mackenzie v. Sutherland* (1895), Ct. of Session, 22 R. 233.

claimed by two factions, a split having taken place in the congregation;² the value of crops in the hands of an incoming tenant when claimed by the landlord and a creditor of the outgoing tenant;³ a bill and cheque in the hands of a law agent for collection, when claimed by the client's assignee in bankruptcy, and by another person who had attached them;⁴ money in a bank claimed by an alleged donee and by the next of kin of the deceased depositor.⁵

How evidenced.—A claim may be evidenced by the legal proceedings in a suit against the stakeholder, or by a demand either oral or in writing. Under the English practice in sheriff interpleader, the claim of the third person on the sheriff must be made in writing.⁷

Need not be sued in equity.—The rule in equity is, that the plaintiff may maintain his bill of interpleader although he has not usually been sued, or has been sued by one only of the connecting claimants, it is sufficient so long as claims are made.⁸

English Statutes.—In England, under the Interpleader Act of 1831,⁹ relief could only be had by a defendant in an action, he was required to show that the subject matter was claimed or supposed to belong to some third party, who had sued or was expected to sue for the same. A sheriff could interplead although no action had been brought against him,¹⁰ as well as after an action had been brought,¹¹

² *Connell v. Ferguson* (1857), Ct. of Session, 19 D. 482.

³ *Park v. Watson* (1874), Ct. of Session, 2 R. 118.

⁴ *Dill v. Ricardo* (1895), Ct. of Session, 12 R. 404.

⁵ *Royal Bank of Scotland v. Price* (1898), Ct. of Session, 20 R. 290. For cases in which there appeared no double distress: See *Logan v. Wilkie* (1855), Ct. of Session, 17 D. 485; *Clark v. Campbell* (1873), Ct. of Session, 1 M. 281; *Glass v. Robertson* (1890), Ct. of Session, 1 F. 391.

⁷ Eng. Order LVII., Rule 16, Ont. Rule 1115.

⁸ *Angell v. Hadden* (1806), 15 Ves. Jun. p. 245; *Morgan v. Marsack* (1816), 2 Meriv. 107; *Richards v. Salter* (1822), 6 Johns. Ch. N. Y. 445; *Yates v. Tisdale* (1837), 3 Ed. Ch. N. Y. 71; *Strange v. Bell* (1852), 11 Ga. 108; *Newhall v. Kastens* (1873), 70 Ill. 156; but see *Brown v. The Britannia Ins. Co.* (1859), 9 Ir. Com. L. R. Ap. xxvi.

⁹ 1 & 2 Will. IV., c. 53.

¹⁰ *Green v. Brown* (1835), 3 Dowl. 337.

¹¹ *Booth v. Preston* (1860), 8 Ont. P. R. 90.

and although he might have pleaded in the action,¹² but on condition that he pay the costs of the action. In 1873 provision was made so that debtors and trustees might interplead although no action had been commenced,¹³ and since 1883 the same rule prevails with regard to all classes of persons, who may interplead when they have been, or expect to be, sued by two or more parties.¹⁴

United States Statutes.—In the United States, under most of the codes, interpleader can only be had by a defendant in an action. The codes, however, of California, Idaho, Montana, Utah and Washington allow relief in certain cases when the applicant has not been sued by either party.¹⁵ In New York State the fact that a defendant who is being sued for money come to his hands cannot be permitted to bring in as additional defendants creditors who claim the fund adversely to the plaintiff, does not interfere with his right, under the interpleader section of the code, upon paying the money into court, to have such adverse claimants substituted as defendants in his place, and to be discharged from liability.¹⁶

In South Carolina, although the code does not provide for interpleader when both claimants are parties to the same action, it does not prevent interpleader under the equitable jurisdiction of the court, which will allow a defendant in a proper case to obtain an order requiring the plaintiff and his co-defendant to interplead. If a defendant could only avail himself of the remedy in the mode prescribed by the code, it would be in the power of a plaintiff to deprive the defendant of such remedy, by also making the rival claimant a defendant.¹⁷

¹² *Macdonald v. Great N. W. Central Railway Co.* (1894), 10 *Man.* 83.

¹³ 23 & 24 *Vict. Imp. c. 66, s. 25, sub-s. 6*; *Re New Hamburg* (1875), *W. N.* 239; *Lacey v. Wieland* (1876), *W. N.* 24.

¹⁴ *Order LVII., Rule 1 (a) and (b).*

¹⁵ *See Appendix.*

¹⁶ *American Trust & Savings Bank v. Thalheimer* (1898), 20 *App. Div.* 170 *N. Y.*

¹⁷ *Brock v. Southern Railway* (1895), 44 *S. C.* 444.

Claims may be legal or equitable.—That the demand of one defendant is by virtue of an alleged legal right, and the other of an equitable title, is no objection to a bill of interpleader. It is sufficient to found the jurisdiction that one title is legal and the other equitable.¹⁸ Where one of the claims is purely equitable, it seems indispensable to come into equity, for in such a case there can be no interpleader awarded at law.¹⁹ Where the titles of all the claimants are purely equitable, there is a still broader ground to award a bill of interpleader.²⁰ That an equitable claim could not be the basis of an application under the English Interpleader Act was early decided. It was said that, the judges at common law had not conferred upon them by the act, the power to determine matters within the province of a court of equity, the intention being to afford relief in those cases only in which the claims depended upon legal rights.²¹ But this rule was soon departed from, and under the more liberal construction of the Act, it was held that courts of law might give effect to equitable claims, and the courts accordingly now follow this latter rule and consider the equitable rights of the parties.²²

¹⁸ *Morgan v. Marsack* (1816), 2 Meriv. 107; *Smith v. Hammond* (1833), 6 Sim. 10; *Crawford v. Fisher* (1840), 10 Sim. 479; *Richards v. Salter* (1822), 6 John. Ch. N. Y. 445; *Yates v. Tisdale* (1837), 3 Ed. Ch. N. Y. 56; *Strange v. Bell* (1852), 11 Ga. 108; *Burton v. Black* (1861), 32 Ga. 58; *Newhall v. Kastens* (1873), 70 Ill. 156; *Fairbanks v. Belknap* (1883), 135 Mass. 179.

¹⁹ *Duke of Bolton v. Williams* (1793), 4 Bro. Chy. 300; *Oil Run v. Gale* (1873), 6 W. Va. 525.

²⁰ *Storey's Equity Jur.*, sec. 808; but see *Barclay v. Curtis* (1821), 9 Price, 661, where it was held that a Court of Equity will not entertain a bill of interpleader founded on equities.

²¹ *Braddick v. Smith* (1832), 9 Bing. 84; *Sturges v. Claude* (1832), 1 Dowl. 505; *Langton v. Horton* (1841), 3 Beav. 464; *Roach v. Wright* (1841), 3 M. & W. p. 155; *Bird v. Orabb* (1861), 30 L. J. Ex. 318; *Huret v. Sheldon* (1863), 13 C. B. N. S. 750.

²² *Putney v. Trigg* (1839), 7 Dowl. 811; *Rusden v. Pope* (1863), L. R. 3 Ex. 209; *Manning v. Bowman* (1872), 9 Nova Scotia, 42; *Duncan v. Cashin* (1875), L. R. 10 C. P. 554; *Engelback v. Nixon* (1875), L. R. 10 C. P. 645; *Jennings v. Mather* (1901), 1 Q. B. 108; *McKenzie v. Aetna* (1879), *Russell's Eq. Decs. Nova Scotia* 346; *Gourlay v. Lindsay* (1879), 2 N. S. Wales, S. C. R. N. S. 278; *Anderson v. Carter* (1894), 20 Victorian L. R. 246; see also *Haddow v. Morton* (1894), 63 L. J. Q. B. p. 40.

This rule is also followed in Massachusetts, where it has been held, that the statute of that State is broad enough to cover equitable rights and interests.²³

Claims must be connected.—It is a prime rule in equity, that the titles of the adverse claimants must be connected, by reason of one being derived from the other, or by both being derived from a common source. There must be privity of some sort between all the parties, such as privity of estate, title or contract.²⁴ It is sufficient, however, to found the right to interplead, if one claimant has, by his own act, given a color of title to the other.²⁵ In the absence of facts which show one thing or the other, relief will be refused.²⁶

In cases, therefore, of adverse independent titles, the party holding the property must defend himself as best he can, and is not entitled to the assistance of a court of equity to relieve him by awarding an interpleader.²⁷

Effect of rule.—This rule has worked considerable hardship on many persons and corporations, who, in the ordinary course of affairs and without any fault, become through some contract lawfully possessed of property, or liable to pay some debt. It has affected particularly tenants, and many classes of agents, such as bailees, consignees, factors and carriers. Such an one, finding himself harassed by a

²³ *Underwood v. Boston Five Cent Savings Bank* (1896), 141 Mass. 305; *Dixon v. National Life Insurance Co.* (1907), 168 Mass. 48; *Brierly v. Equitable Aid Union* (1898), 48 N. E. Rep. 1090 Mass.

²⁴ *Dungey v. Angove* (1794), 2 Ves. Jun. 308; *Clark v. Byne* (1807), 18 Ves. Jun. 383 b; *Lowe v. Richardson* (1818), 3 Mad. 277; *Crawshaw v. Thornton* (1837), 2 M. & C. 1; *Watts v. Hammond* (1855), 3 W. R. 312; *Cook v. Earl of Rosslyn* (1861), 1 Giff. 167; *Fuller v. Patterson* (1869), 16 Grant. Ont. 31; *Gibson v. Goldthwaite* (1845), 7 Ala. 281; *Kyle v. Mary Lee Coal & Ry. Co.* (1896), 112 Ala. 606; *Wells v. Miner* (1885), 25 Fed. Rep. (Cal.), 533; *National v. Platte* (1894), 54 Ill. App. 483; *Boston v. Skillings* (1882), 132 Mass. 410; *Fairbanks v. Belknap* (1883), 135 Mass. 179; *Snodgrass v. Butler* (1876), 54 Miss. 45; *Sullivan v. Knights of Father Matthew* (1907), 73 Mo. App. 43; *Shaw v. Coster* (1840), 8 Pal. N. Y. 339; *Trigg v. Hits* (1864), 17 Abb. Pr. N. Y. 436; *Lund v. Seamen* (1862), 37 Barb. N. Y. 129; *Bartlett v. The Sultan* (1885), 23 Fed. Rep. (N. Y.) 257; *Aland v. Bank* (1883), 31 P. L. J. (Pa.) 80.

²⁵ *East India Co. v. Edwards* (1811), 18 Ves. Jun. 376; *Glynn v. Locke* (1842), 3 Dr. & War. 11.

²⁶ *Kyle v. Mary Lee Coal & Ry. Co.* (1896), 112 Ala. 606.

²⁷ *First National Bank v. Bininger* (1875), 28 N. J. Eq. 345.

third party, claiming the property or debt in a manner paramount to the contract, is left to answer both the contract and the adverse claim as best he may. The courts have sometimes resorted to logical expedients to explain why this rule should be followed. It has been pointed out that, it would be a great injustice if there were a loop hole through which parties might evade a deliberate covenant, by procuring third persons to set up claims. In this argument it seems to have been considered more in the interests of justice, that the debt, or property, should be rendered in pursuance of the contract, than that the debtor or stakeholder should be relieved of his possible double liability, and of vexatious litigation.²⁸ In an early decision it was said, that the alarming consequence would be, if a contrary practice were tolerated, that a tenant in possession, whose duty is to stand by and defend his landlord, would become the instrument to betray him.²⁹

Cases in which relief refused. — The following are examples of adverse claims in which interpleader has been refused: a tenant seeking to have his landlord interplead with a stranger to the lease;³⁰ an agent asking to have an interpleader between a third person claiming paramount to or independently of his principal, and the latter;³¹ a purchaser of goods, from whom they were claimed by the vendor on the ground that they had been obtained by fraud, while two others also claimed them, one in virtue of a lien for freight and a second on account of advances;³² a township treasurer to whom a drain tax was paid under protest, where the tax was claimed back by the person who paid it, and by a person to whom a township order on the trust fund had been given;³³ an auctioneer who had sold goods for a chattel mortgagee, the proceeds being also claimed

²⁸ *Cook v. Earl of Rosslyn* (1859), 1 Giff. 167.

²⁹ *Dungey v. Angove* (1789), 2 Ves. Jun. 303.

³⁰ *Handcock v. Shaen* (1701), 1 Colles 122.

³¹ *Nicholson v. Knowles* (1820), 5 Mad. 47, 21 R. R. 276; *McLaughlin v. Pitt* (1896), 6 N. S. Wales W. N. 109.

³² *Hornby v. Gordon* (1862), 9 Bosw. N. Y. 656.

³³ *Wallace v. Sortor* (1883), 52 Mich. 159.

by an assignee in bankruptcy of the mortgagor;²⁴ a bank which had collected a draft for a customer where the proceeds were demanded by the customer's executor, and a third party who alleged that the customer was his agent;²⁵ and a person from whom a commission was claimed by two real estate brokers, under independent contracts.²⁶

Cases in which relief awarded.—The following are connected claims in respect of which interpleader will be allowed: Where a third party claims of a tenant, the rent, as assignee or mortgagee of the landlord;²⁷ when a principal creates the adverse title by an assignment legal or equitable, or it is founded by operation of law, as in a case of bankruptcy, the agent may call on his principle to interplead with the assignee.²⁸ So, where the two claimants originally make a joint deposit, and afterwards both claim the subject of it.²⁹

Case of three claims.—When there are three claimants, and the claim of one is paramount and adverse to the claims of the other two which are connected, one of these latter two cannot object to the right of interpleader, because the claim of the third claimant is adverse.³⁰

View of doctrine in United States.—In the United States, the rule has been looked upon as narrow and inequitable. Story, in discussing it, questions whether it might not have been more wise and more consistent with the principles of equity, to have held that, in all cases when the bailee is innocent and without any fault, he should have a right to a bill of interpleader.³¹ Pomeroy regards the rule much in the same way, and says that, it is a manifest imperfection of equity jurisprudence that it should be so limited. A

²⁴ *McClelland v. Reilly* (1879), 4 Ir. R. C. L. 690.

²⁵ *Third National Bank v. Skillings* (1882), 182 Mass. 410.

²⁶ *McCreery v. Inge* (1900), 49 App. Div. N. Y. 133.

²⁷ *Cowan v. Williams* (1903), 9 Ves. Jun. 107; *McCoy v. McMurtrie* (1877), 12 Phila. Pa. 180.

²⁸ *German Exchange Bank v. Board of Commissioners* (1879), 57 How. N. Y. 187; *Glynn v. Locke* (1842), 3 Dr. & War. 11.

²⁹ *Nolan v. London* (1889), 6 N. S. Wales W. N. 127.

³⁰ *Farebrother v. Beale* (1849), 3 De G. & Sm. 637.

³¹ *Story's Eq. Jur.* sec. 819.

person may be, and is, exposed to danger, vexation, and loss from conflicting independent claims to the same thing, as well as from claims that are dependent, and there is nothing in the nature of the remedy, which need prevent it from being extended to both classes of demands.⁴¹ A New York judge has recently remarked that, while the early authorities were exacting upon this subject, many of the later cases have been less rigid, and some have ignored it altogether, and he points out that the doctrine has been abrogated in England by statute.⁴²

Doctrine abrogated by statute.—In England, doubts were entertained whether the Interpleader Act of 1831 applied, when the titles of the claimants had not a common origin, but were adverse. To remove this doubt the Common Law Procedure Act of 1860 enacted, that interpleader should lie though the titles of the claimants to the money, goods, or chattels in question, or the proceeds or value thereof, had not a common origin, but were adverse to and independent of one another.⁴³ This provision is continued in the present English rules,⁴⁴ and is now in force in Ireland,⁴⁵ and is applicable to all cases of interpleader.

In a few of the American States, namely in California, Idaho, Montana and Utah, a similar provision has been enacted, that relief may be had although the titles or claims have not a common origin, or are not identical, but are adverse to and independent of one another.⁴⁶

In Ontario this provision was introduced in 1869, in the case of interpleader by bailees and carriers,⁴⁷ but it only became applicable generally to all cases of interpleader by

⁴¹ Pomeroy's Eq. Jur., sec. 1324.

⁴² *Crane v. McDonald* (1890), 118 N. Y. 648; see also *Schuyler v. Hargous* (1865), 28 How. Pr. N. Y. 245.

⁴³ 23 & 24 Vict. Imp. c. 126, s. 12; *Meynell v. Angell* (1862), 32 L. J. Q. B. 14; see also *Scott v. The Midland Ry.* (1851), 2 Ir. C. L. R. 83.

⁴⁴ Order LVII, rule 3, see appendix.

⁴⁵ See under Ireland in appendix.

⁴⁶ See *Wells v. Miner* (1885), 25 Fed. Rep. Cal. 533, and appendix.

⁴⁷ 33 Vict. Ont. c. 17.

the rules adopted in 1888.⁴⁰ In the other Canadian Provinces, where the English Judicature Act has been enacted, this same rule is in force, namely in Nova Scotia, Prince Edward Island, Manitoba, North-West Territories and British Columbia.⁴¹

Claims should be investigated.—A person on whom claims have been made in respect of the same subject matter, should, before coming to the court, make some investigation himself with regard to the nature of the claims, so that he may be satisfied that he is really in a difficulty; for one, who can by ordinary diligence inform himself to which of the claimants payment should be made, cannot maintain interpleader;⁴² for it excludes all cases where the rights of the parties are clearly settled.⁴³ If therefore one of the claims be either obviously good or bad, as will presently appear, interpleader will not lie, therefore, to prevent a dismissal of his application the person seeking relief should first make a careful inquiry.

Sheriff should inquire.—It is also the duty of a sheriff to make some inquiry, as to the nature of the claims, before he comes to the court. He is not to be spared all trouble, and sheriff's applications are not to be considered as a matter of course. When the right of the execution creditor, or of the claimant, is clear, and the facts may be easily ascertained, the law does not intend the sheriff to be relieved from the exercise of a sound judgment, by application to the court for indemnity under the Interpleader Statute.⁴⁴ It was the rule in equity, that the sheriff should have some reasonable ground for believing that the goods seized were the debtor's. It is a fair presumption that goods on the

⁴⁰ Ont. Rule 1105.

⁴¹ See in appendix.

⁴² *Sulzbacker v. National* (1884), 52 N. Y. Super. Ct. 269.

⁴³ *Dorn v. Fox* (1874), 61 N. Y. 264; and see *Morgan v. Fillmore* (1864), 18 Abb. Pr. N. Y. 217.

⁴⁴ *Bishop v. Hinxman* (1833), 2 Dowl. 166; *Walker v. Niles* (1870), 3 Ont. Chy. Chamb. 59; *Wilkins v. Peatman* (1877), 7 Ont. P. R. 84; *Monitor Plow Works v. Allen* (1877), Man. R. Temp. Wood 165.

debtor's premises belong to him, yet it is quite consistent with that state of things, that they may belong to another.⁵³

Submit claim to other claimant.—It is a reasonable precaution for a stakeholder, to inform each claimant that there is an adverse claim. It may be, that one claimant will abandon if he knows of the other claim, and the apparent difficulty will disappear. It has been held that, a sheriff could not file a bill of interpleader, until he had informed the judgment creditor of the adverse claim, and ascertained whether the latter claimed the goods, or would give them up.⁵⁴

A sheriff who seeks interpleader without having taken this precaution, may find on the return of his application that the execution creditor will not dispute the claim, with the result, that the application will be dismissed with costs payable by the sheriff.⁵⁵

In England and Ontario.—Under recent enactments in England and in Ontario, a sheriff is obliged to submit the adverse claim to the execution creditor, who must then within four days in England, and seven in Ontario, admit or dispute the claim. It was held under these rules that the sheriff could only interplead, upon the creditor disputing the claim, or upon his failing to answer one way or the other;⁵⁶ but now, by subsequent amendments in both countries, the sheriff may still be protected against actions, when, after seizure, the execution creditor admits the claimant's title.⁵⁷

Solicitor instructing sheriff.—A sheriff should remember that notice of the claim is to be given to the execution creditor, his solicitor is not mentioned, and, as in the majority of cases, the sheriff has to deal with the solicitor, he

⁵³ *Tufts v. Harding* (1859), 6 Jur. N. S. 116.

⁵⁴ *Dalton v. Furness* (1866), 35 Beav. 461.

⁵⁵ *Prosser v. Malby* (1884), 28 Sol. J. pp. 411, 616; *Canadian Bank of Commerce v. Tasker* (1890), 8 Ont. Pr. 351; *Glasier v. Cooke* (1835), 5 N. & M. 680; *Vanstaden v. Vanstaden* (1884), 10 Ont. Pr. 428; *C. v. D.* (1883), W. N. 207.

⁵⁶ Eng. Order LVII, Rule 16; Ont. Rule 1115. Also see *Moore v. Hawkins* (1895), 15 Reports, 357.

⁵⁷ Eng. Order LVII., Rule 16 A, Ont. Rule 1115.

should also remember in taking instructions, that a solicitor retained to collect a debt, is not entitled to interplead without a further retainer for that purpose, because proceedings in interpleader are substantially a second action.⁵⁹ It has also been held, that an attorney has no implied authority to give instructions to a sheriff to seize particular goods.⁶⁰

Where notice of claim was given by a solicitor, and the claimant did not appear on the application, the court only granted a conditional order, to be served on the claimant personally, calling on him to show cause why he should not pay the costs.⁶¹

What must be shown to the court.—The person seeking relief must state fully and specifically the facts which show that two adverse claims have been made upon him, so that the court may see, that the claims are of such a character, and sustain such a relation to the fund, as to make a fit subject for interpleader. It must appear that there is a question between the two claimants, and the court is bound to see that there is a question to be tried.⁶² The facts will be set forth in the bill of complaint or other pleading, when an interpleader suit or an action of interpleader is begun, or in an affidavit when the application for relief is in a summary way under an interpleader statute by petition, summons or motion.⁶³

If the claims are not set forth with as much accuracy and particularity as could be desired, it must be recollected that the party seeking relief is not a claimant to the fund. He only sets out the claims as exhibited or made to him,

⁵⁹ *Hackett v. Bible* (1888), 12 Ont. Pr. 482; *James v. Ricknell* (1887), 20 Q. B. D. 164.

⁶⁰ *Wallbridge v. Hall* (1887), 7 Canada L. T. 259; *Smith v. Keal* (1882), 9 Q. B. D. 340; *Pardee v. Glass* (1886), 11 Ont. R. p. 280.

⁶¹ *Burke v. Burke* (1878), 12 Ir. L. T. & Sol. J. 50 and 88.

⁶² *Cochrane v. O'Brien* (1845), 1 Ir. Eq. R. 241; *Briant v. Reed* (1862), 14 N. J. Eq. 271; *Starling v. Brown* (1870), 7 Bush (Ky.), 164; *Snodgrass v. Butler* (1870), 54 Miss. 45; *Baltimore v. Arthur* (1882), 90 N. Y. 234; *Varrian v. Berrien* (1886), 42 N. J. Eq. 1; *Schell v. Lowe* (1894), 75 Hun. N. Y. 43; *National v. Augusta* (1896), 99 Ga. 286.

⁶³ See chap. VII.

and cannot be supposed to do it with as much accuracy as the claimants themselves would do. It is enough for him to satisfy the court that there are opposing claims, against which he is entitled to protection.⁴³

The true providence of a bill of interpleader is to set forth substantially the general nature of the claims asserted by the two parties, and it is the duty of the plaintiff to set forth generally in his petition the nature of the claims that have been made, so that the court may determine from the petition itself, whether interpleader is proper.⁴⁴

It has been said in *Manitoba*, that in no case is the plaintiff in a bill of interpleader required to set out the titles of the several defendants with the same fulness, as if each of such defendants were filing a bill upon his own claim. One of the clauses usually inserted in the prayer of a bill of interpleader, is, for an order that the defendants state the particulars of their respective titles.⁴⁵

Mere fact of double claim not sufficient.—It is not enough to show that two claims are presented, the mere fact of a double claim is not in all cases and under all circumstances the test of the right to maintain interpleader. The possession of the fund or property may be of such a character as to preclude the right to dispute the title of another, or the parties may claim the same property under different titles, not derived from the same common source.⁴⁶ Unless, therefore, something more appears than that a demand has been made, or a notice of claim served, the court will not exercise its discretion in favour of the applicant.⁴⁷

It is not sufficient, merely to state that *conflicting* claims have been made, the applicant must show something of their

⁴³ *Westervelt v. Ackerman* (1835), 2 Green N. J. 325.

⁴⁴ *Connecticut Mutual Life Ins. Co. v. Lea* (1900), 7 Ohio N. P. 10.

⁴⁵ *Tees v. Spence* (1886), 3 Man. 450.

⁴⁶ *Emerick v. New York Life* (1878), 40 Md. 352; *Stevenson v. New York Life* (1890), 10 App. Div. N. Y. 233; *Congriff v. Hudson* (1896), 52 N. Y. S. 182.

⁴⁷ *Wells v. National City Bank* (1899), 40 App. Div. N. Y. 493.

nature;⁶⁸ but he is not obliged to produce proofs of their validity or sufficiency.⁶⁹

A sufficient claim is not shown by an applicant, when his affidavit refers to copies of documents produced to him by a claimant, with hearsay evidence in the absence of the originals;⁷⁰ and where the applicant does not state any facts showing the nature of the adverse claims, or showing that a claim is not frivolous, interpleader will not lie, for it is then impossible for the court to say whether the circumstances show a case fit for the remedy.⁷¹

Where a defendant merely stated, that he was informed and believed that a third party based his claim upon an agreement alleged to be in existence, and it did not appear whether such agreement was oral or in writing, nor was anything shown of its terms, it was held that sufficient circumstances were not stated.⁷²

The question for the court.—After the applicant has investigated the claims, and has laid before the court the result of his inquiry, the question arises, has he shown enough, or, is what he has shown sufficient to justify the application of the remedy? When he has fully stated the facts, it is for the court to say, whether the applicant would incur such risk in determining which of the parties he should pay, as to devolve upon the court the duty of exercising the discretion committed to its favour. The applicant's affidavit is not defective, if it does not state, that he cannot determine without hazard to himself to which party the money belongs, if he did, it would be an expression of opinion and not a fact.⁷³ It is not his duty to determine for himself which claim is sustained in fact.⁷⁴

Some proof in all cases.—No less proof is required, to entitle a defendant to obtain an order of interpleader in a

⁶⁸ *Robards v. Clayton* (1892), 49 Mo. App. 606.

⁶⁹ *Dreyfus v. Casey* (1889), 52 Hun. N. Y. 95.

⁷⁰ *Mars v. Albany* (1893), 69 Hun. N. Y. 898.

⁷¹ *Mahro v. Greenwich* (1896), 38 N. Y. S. 126.

⁷² *Roberts v. Vanhorne* (1897), 21 App. Div. N. Y. 860.

⁷³ *Schell v. Low* (1894), 75 Hun. N. Y. 43.

⁷⁴ *Connecticut Mutual Life Ins. Co. v. Lee* (1900), 7 Ohio N. P. 10.

summary way, than is necessary to support a bill or an action of interpleader.⁷⁵

Decisions inharmonious. — It has been said by a New York judge, that the modern decisions, upon what the applicant must show, of the claims interposed, are in a very inharmonious condition,⁷⁶ and, that this is so, is evident from the following:—

It has been decided that he must show, a colour of right in each claimant;⁷⁷ that each claim is apparently well founded;⁷⁸ and that he is ignorant of the rights of the claimants.⁷⁹ Then, from the negative side it has been held, that he need not show a clear title in either against the other, nor that a claim interposed will probably be successful;⁸⁰ nor an apparent title in each;⁸¹ nor that one claim is open to objection.⁸² It is enough that there are opposing claims,⁸³ and that he has a well founded apprehension of danger from the conflicting claims.⁸⁴

The old rule.—It was at first the rule, that a stakeholder was justified in filing a bill of interpleader, if there were the slightest doubt or risk from conflicting claims.⁸⁵ But this old rule, that the stakeholder is entitled to be removed beyond the shadow of a risk, and that in order to entitle him to the protection of the court, it is only necessary to establish that suits have been brought, or that claimants have threatened to bring them, no longer prevails.⁸⁶

⁷⁵ *Wells v. National City Bank* (1899), 40 App. Div. N. Y. 498.

⁷⁶ *Burritt v. Preas Publishing Co.* (1897), 19 App. D. N. Y. 609.

⁷⁷ *Robards v. Clayton* (1892), 49 Mo. App. 608; *Sullivan v. Knights of Father Mathew* (1897), 73 Mo. App. 43.

⁷⁸ *Davis v. Davis* (1895), 96 Ga. 186; *Roberts v. Vanhorne* (1897), 21 App. Div. N. Y. 369.

⁷⁹ *Jordan's Appeal* (1880), 10 W. N. C. (Pa.) 37; *Trigg v. Hits* (1864), 17 Abb. Pr. (N. Y.) 436.

⁸⁰ *Sullivan v. Knights of Father Mathew* (1897), 73 Mo. App. 43.

⁸¹ *East v. Littledale* (1848), 7 Hare 57; *Supreme v. Raddatz* (1894), 57 Ill. App. 119.

⁸² *Doran v. Toronto* (1890), 14 Ont. Pr. 104.

⁸³ *Westervelt v. Ackerman* (1885), 2 Green N. J. 325.

⁸⁴ *Blair v. Porter* (1861), 13 N. J. Eq. 267; *National v. Augusta* (1896), 90 Ga. 286.

⁸⁵ *Nelson v. Barter* (1864), 2 H. & M. 334.

⁸⁶ *Nassau v. Yandes* (1887), 44 Hun. N. Y. 55; *Cosgriff v. Hudson* (1898), 52 N. Y. S. 189; *Post v. Emmett* (1899), 40 App. Div. N. Y. 477.

Doctrine of reasonable foundation. — It is now well settled, that an applicant for relief by interpleader from hostile claimants must show affirmatively, that the claims asserted or interposed have some reasonable foundation or plausibility, so that the court may see that there is a question to be tried.⁸⁷ As has already been stated, the mere fact that claims have been made is not sufficient, it is necessary to show in addition, some circumstances which will satisfy the court that the claims have some facts to support them, or such foundation in law as will create a reasonable doubt, whether the holder of the fund will be safe in paying it over to the person from whom he received it.⁸⁸

Rule in Scotland. — In Scotland, where the remedy, known as multiplepoinding, can be raised, either by the stakeholder or by one of the claimants, it has been held, that it is not enough to say 'I have a claim.' Some intelligible ground for the claim must be stated, not that the holder of the fund may form an opinion or judgment on the merits of the claim, but that he may see that a real question between hostile parties is raised. The holder of the fund is not bound to know or set forth the specific grounds of the several claims. He must make a relevant statement, that separate and hostile claims have been made to him.⁸⁹ The claims must be more than mere random claims, they must be real and intelligible, set forth upon grounds which may or may not be well founded in law, but which are at least stated with sufficient precision, to show that there is a double claim upon one fund, maintained by persons having hostile interests.⁹⁰

⁸⁷ *Nassau v. Yandes* (1887) 44 Hun. N. Y. 55; *Feldman v. Grand Lodge* (1892), 19 N. Y. S. 73; *Stevenson v. New York Life* (1890), 10 App. Div. N. Y. 233; *Lennon v. Metropolitan Life* (1897), 45 N. Y. S. 1033; *Cosgriff v. Hudson* (1898), 52 N. Y. S. 180; *Southwark v. Childs* (1899), 39 App. Div. N. Y. 590; *Kreiser v. City of New York* (1899), 61 N. Y. S. 329.

⁸⁸ *Post v. Emmett* (1899), 40 App. Div. N. Y. 477.

⁸⁹ *Fraser v. Wallace* (1893), Ct. of Session, 20 R. 374.

⁹⁰ *Commercial Bank of Scotland v. Muir* (1897), Ct. of Session, 25 R. 219.

There must be doubt and hazard.—It must also appear, that there is some reasonable doubt or uncertainty, as to whether the stakeholder will be reasonably safe in paying or delivering the subject-matter to one of the claimants, without rendering himself liable for the same debt or duty to the other; that is, that there is some real doubt in his mind, to which of the rival claimants the admitted debt belongs. It follows therefore, that interpleader will only lie, when the applicant cannot pay to one claimant without some substantial risk of being proceeded against by the other, or that he cannot without hazard determine to which of the claimants he should pay.⁹¹

In an action by a mortgagee of premises, which had been covered by a policy of fire insurance, payable to the owner or to the mortgagee, as their interests might appear, to recover the insurance moneys, the insurance company was allowed to interplead the owner and the mortgagee, as it appeared that the owner claimed an interest in the fund, having in the mortgagee's foreclosure action raised the defence of usury, and having in good faith taken an appeal from the judgment for foreclosure.⁹²

Reason for the rule.—It would seem that this rule applies more firmly, when the stakeholder has been sued by one of the claimants, than it does when he institutes an action of interpleader, or files a bill, before suit. It has accordingly been stated, that the reason upon which the rule rests, is, that a plaintiff suing for money or property, should not be compelled without good cause to litigate his

⁹¹ *Briant v. Reed* (1862), 14 N. J. Eq. 271; *New York v. Haws* (1873), 35 N. Y. Sup. Ct. 372; *Jordan's Appeal* (1880), 10 W. N. C. (Pa.) 37; *Baltimore v. Arthur* (1882), 90 N. Y. 234; *McCullen v. Metropolitan Life*, 2 Dist. Rep. Pa. 361; *Williams v. Aetna* (1887), 8 N. Y. St. Repr. 567; *Nassau v. Yandes* (1887), 44 Hun. N. Y. 55; *Stevenson v. New York Life* (1896), 10 App. Div. N. Y. 233; *Lennon v. Metropolitan Life* (1897), 45 N. Y. S. 1033; *Burritt v. Press Pub. Co.* (1897), 19 App. Div. N. Y. 609; *Sullivan v. Knights of Father Mathew* (1897), 73 No. App. 43; *Golden v. Metropolitan Life* (1898), 35 App. Div. N. Y. 569; *Cosgriff v. Hudson* (1898), 52 N. Y. S. 189; *Schweiger v. German* (1899), 57 N. Y. S. 356; *Southwark v. Childs* (1899), 39 App. Div. N. Y. 560.

⁹² *Sexton v. Home Fire Ins. Co.* (1898), 35 App. Div. N. Y. 170.

right or title with a third party, who may choose to lay claim to the same debt or property. It is thus, for the purpose of relieving the plaintiff from vexatious and ill-founded interference, with the proper enforcement by him of his rights against the defendant, that the defendant, seeking to interplead him with a third party, is required to state facts from which the court can determine whether the defendant is exposed to actual hazard of a double payment. In such a case the plea of inconvenience to the plaintiff must yield to the proper protection of the stakeholder. As the rule is for the plaintiff, it cannot be invoked by the claimant. It would be absurd to require the defendant to demonstrate to the claimant, that the claim which the latter makes has some reasonable foundation. His right, at most, is to insist, before he is brought into the action, that there is some reasonable foundation for the plaintiff's claim.⁸³

Degree of doubt which must exist.—It is not necessary for the applicant to decide at his peril, either close questions of fact, or nice questions of law, but it is sufficient, if there be a reasonable doubt as to which claimant is entitled to payment. If the doubt rests upon a question of fact, that is at all serious, it is obvious that the debtor cannot safely decide it for himself, because it might be decided the other way upon an actual trial; while, if it rests upon a question of law, so long as a principle is still under discussion, it would seem fair, to hold, that there is sufficient doubt and hazard to justify the protection which is afforded by the beneficent action of interpleader.⁸⁴

Must be an actual second claim.—There must be an actual second claim; it is not sufficient to suggest that another person who has not sued is entitled, or that a person not making any claim may do so in the future.⁸⁵ One who makes no claim, and has no interest, is not a proper defendant

⁸³ *Butler v. Atlantic Trust Co.* (1899), 59 N. Y. S. 814; *Burritt v. Press Publishing Co.* (1897), 19 App. Div. N. Y. 609.

⁸⁴ *Crane v. McDonald* (1890), 118 N. Y. 648.

⁸⁵ *National Union Bank v. Kleinwort* (1897), 15 App. Div. 478 N. Y.; *Stewart v. Smith* (1850), 1 Phila. Pa. 43.

to a complaint for interpleader.⁸⁶ An applicant's affidavit is not sufficient, when it fails to show that an alleged claimant, ever made any demand for the subject matter.⁸⁷ It has therefore been held, that notice by the solicitor for the petitioning creditor, that a fiat in bankruptcy has issued against the debtor whose goods have been seized and sold by the sheriff, is not a sufficient claim to warrant the sheriff interpleading, as it is not equivalent to a claim by the trustee.⁸⁸ An allegation that the plaintiff is informed of a certain claim by one of the defendants, but is uncertain as to the fact, is fatally defective.⁸⁹ A sheriff upon being alarmed, cannot call upon a stranger to the execution to come before the court and make a claim, when no claim has really been made.¹

It has been decided in Alabama, that in an ordinary suit, a plea which in substance merely suggests another claimant for the property sought to be recovered, without a request for an interpleader, is subject to demurrer.²

One claim must be successful.—It must appear that one of the demands, made on the fund, will probably be successful.³ The claims must negative each other, because if one of them can be legally enforced, without implying the invalidity of the other, there is nothing to be settled by interpleader;⁴ and, if on the plaintiff's own showing, it appears that neither of the defendants is entitled to the money, the remedy will not lie.⁵ In some cases where interpleader is proper, and may be allowed, it may possibly appear on the trial between the claimants that neither of them is entitled.⁶

⁸⁶ *Ketchum v. Brazil* (1883), 88 Indiana 515.

⁸⁷ *Mansfield v. Shipp* (1891), 27 N. E. Rep. Ind. 427; *Ter Knille v. Reddick* (1896), 30 Atl. Rep. 1062 N. J.

⁸⁸ *Bentley v. Hook* (1834), 2 Dowl. 339; *Tarleton v. Dumelow* (1838), 5 Bing. N. C. 110.

⁸⁹ *State Insurance Co. v. Gennert* (1873), 2 Tenn. Chy. 82.

¹ *Isaac v. Spilsbury* (1833), 2 Dowl. 211.

² *Atkins v. Knight* (1871), 46 Ala. 539.

³ *Bowery National Bank v. New York* (1896), 4 N. Y. St. Rep. 565; 42 Hun. N. Y. 659.

⁴ *Moore v. Barnhoisel* (1881), 45 Michigan 500.

⁵ *Barker v. Swain* (1858), 4 Jones Eq. N. Carolina 220.

⁶ *Keener v. Grand Lodge A. O. U. W.* (1899), 38 Mo. App. 543.

A mortgagor was refused relief, where he alleged that an attorney of the mortgagee had demanded the mortgage money, that the mortgagee was insane when the power of attorney was executed, and that the mortgagee's daughter forbade him paying over to the attorney, the mortgagee himself not having been made a party.⁷

If one claim is valid.—Interpleader will not lie, when it appears from the applicant's own showing, that the claim of one of the claimants is legal and valid, and that he is therefore clearly entitled to the debt or duty claimed, to the exclusion of the other claimant.⁸ Nor will an interpleader be granted, when the stakeholder has a perfect defence at law, as to one of the claimants.⁹ In such cases, both claimants may object to the application, the one because he puts forward no valid claim, and the other because no claim of right appears in the co-claimant.¹⁰

If one claimant can give discharge.—A stakeholder cannot have an interpleader, when it appears that a payment or delivery to one of the claimants would have discharged him from all liability.¹¹ Thus, a party was refused relief, when it appeared that he could have safely paid the money to the attorneys of the claimant where the latter had sued him;¹² and also where one claimant was an attaching creditor, whose order had been made absolute, because such claim was obviously good.¹³ So, where a legacy in an executor's

⁷ *Blake v. Garwood* (1886), 42 N. J. Eq. 276.

⁸ *Mohawk v. Clute* (1834), 4 Paige N. Y. 384; *School District v. Weston* (1875), 31 Michigan 86; *Dry Dock v. Carr* (1847), 2 Barb. N. Y. 60; *Bassett v. Leslie* (1890), 123 N. Y. 396; see also *Gantz v. McCracken*, 4 York Pa. 184.

⁹ *Conner v. Webber* (1878), 12 Hun. N. Y. 580. But see ante page 12.

¹⁰ *Shaw v. Coster* (1840), 8 Paige N. Y. 339; *Briant v. Reed* (1862), 14 N. J. Eq. 271; *Starling v. Brown* (1870), 7 Bush Ky. 164; *Crane v. Memphis* (1892), 11 So. Rep. (Ala.) 490.

¹¹ *French v. Howard* (1814), 3 Bibb. Ky. 301; *Schuyler v. Pellissier* (1836), 3 Edw. N. Y. 191; *Delancy v. Murphy* (1881), 24 Hun. N. Y. 508; *Savings Fund v. Clark* (1881), 11 W. N. C. Pa. 118; *McCullen v. Metropolitan Life Ins. Co.* (1886), 2 Dist. Rep. Pa. 361.

¹² *Myers v. The United Guarantee, etc., Co.* (1855), 7 De G. M. & G. 112.

¹³ *Randall v. Lithgow* (1884), 12 Q. B. D. 525.

hands was attached by one creditor of the legatee, and subsequently another creditor of the same legatee had a receiver appointed to receive it, interpleader was refused, because payment to the attaching creditor would have discharged the executor.¹⁴

Must be more than an idle threat. — A proper claim should be more than a mere idle threat.¹⁵ Under the first Interpleader Act, it was necessary that a stakeholder should show more in his affidavit, than the mere words of the Act, "that some third person is expected to sue."¹⁶ He cannot have relief, when he has no just expectation that he will be sued by the second claimant; and it is not enough for him to say that he anticipates a third party will sue him, if he pays the money to a present plaintiff.¹⁷

In Scots law, if a person thinks himself entitled to property in the possession of another, his course is to raise a direct action. He is not entitled to raise a multiplepinding on the mere report that some one else is claiming the fund.¹⁸ This process, however, is not an unusual method of raising the question, whether a person who would undoubtedly have right, if alive, is really dead or not.¹⁹

Claim must be mature.—The claimant's title must be matured, fixed, and determined, or at least so far settled, as not to depend upon the happening of a future event, and so interpleader will not lie, when one claimant asks that matters remain in *statu quo* until his claim may mature;²⁰ nor when it appears on the face of the proceedings, that one can claim present payment, and the other only at a future date.²¹

A tenant was accordingly refused a bill of interpleader, because it appeared that no legal steps by distress or other-

¹⁴ *Stewart v. Grough* (1887), 7 Canada L. T. 429.

¹⁵ *Cook v. Earl of Rosslyn* (1861), 3 Giff. 175.

¹⁶ *Sharpe v. Redman* (1837), 1 Will. W. & D. 375.

¹⁷ *Harrison v. Payne* (1836), 2 Hodges 107; *Bevan v. The Britannia Ins. Co.* (1859), 9 Ir. Com. L. R. Ap. xxvi.

¹⁸ *Winchester v. Blakey* (1890), Ct. of Session, 17 R. 1046.

¹⁹ *Tait's Factor v. Meikle* (1890), Ct. of Session, 17 R. 1182.

²⁰ *Traveller's Insurance Co. v. Healey* (1895), 86 Hun. N. Y. 524.

²¹ *Hewitt v. Helise* (1895), 11 Ont. Pr. 47.

wise had been taken;²² and where goods are claimed to be the property of a decedent, an interpleader will not be granted until an administrator is appointed,²³ or the will is proved.²⁴ Before a creditor can be a claimant, he must have taken proper proceedings to establish the legal existence and amount of the debt owing to him.²⁵

In Scotland, if a claimant have no present title on which he can sue, or in any way distress the holder of the fund, and it can be shewn at the outset that he has no title to pursue his claim, such want of title constitutes a good objection to an action of multiplepinding. An interest in such a process, is something more than a mere claim, it must have for its foundation a bond or bill.²⁶

If one claim obviously bad.—When it clearly appears on the face of the proceedings, that the claim of one party is frivolous and without validity,²⁷ or that one party has obviously no title, or a subordinate one, or that either claim is not well founded in law,²⁸ interpleader will not be granted. And when the proceedings show, that one party has no claim, either legal or equitable,²⁹ or furnish no ground for belief that one claimant has a claim,³⁰ either claimant may object to the applicant's right to relief.

Cases in which relief refused.—The following are cases in which interpleader has been refused, owing to one claim being either too weak or too strong.

²² *Rowland v. Powell* (1744), 1 Ridgew 260.

²³ *Pashley v. White* (1881), 38 L. J. Pa. 52.

²⁴ *Burke v. Rutledge* (1851), 3 Ir. Jur. O. 3. 148.

²⁵ *Hines v. Spruill* (1838), 2 Dev. & B. N. Carolina 96; *Venable v. New York Bowery Life Insurance Co.* (1882), 49 N. Y. Supr. Ct. 481; *McCrea v. Cook* (1881), 1 Rob. C. C. N. Y. 385; *Mahon v. Moyna* (1846), Bl. D. & O. 98.

²⁶ *Wemyss v. Campbell* (1864), Ct. of Sessions, 2 M. 461; *Royal Bank v. Stevenson* (1849), Ct. of Session, 12 D. 250; see also *White v. Spottiswoode* (1846), Ct. of Session, 3 D. 952; *Pollard v. Gallows* (1881), Ct. of Session, 9 R. 21.

²⁷ *Pustet v. Flannelly* (1880), 60 How. N. Y. 67.

²⁸ *Darthes v. Winter* (1823), 2 Sim. & Stu. 536; *Desborough v. Harris* (1855), 5 De G. M. & G. 439; *Connecticut Mutual Life Ins. Co. v. Lea* (1900), 7 Ohio N. P. 10.

²⁹ *Pusey v. Miller* (1804), 61 Fed. Rep. Del. 401.

³⁰ *Wilson v. Duncan* (1860), 11 Abb. Pr. N. Y. 3.

A bank had a large sum at the credit of a customer, when a commission in bankruptcy issued against the latter, but was not proceeded with, owing to an arrangement with the creditors. The bank fearing difficulty, applied for relief by interpleader, but was refused.³¹

An action having been brought to recover moneys on deposit in a bank, by the customer's assignee for creditors, and the same having also been claimed by other parties who alleged that the money in the bank was the proceeds of their property, relief was refused, as it was said that more must be shown than a mere demand, or notice of claim.³²

A bank alleging that a deposit was claimed by the depositor, by the depositor's assignee, and by another person, who claimed that the money had been stolen from him, was refused interpleader; because it appeared, that the depositor admitted the assignment, and that the charge of stealing had been dismissed, therefore it was said, the claims were too shadowy and unsubstantial to be given serious consideration.³³

Where the right of action of a depositor against a savings bank was not negotiable at law, it was held that the bank could not have relief by interpleader, upon calling in a third party who could have no claim.³⁴

On the ground, that an attaching creditor is not in a position to assail the title of an assignee of his debtor, to chuses in action, it has been held, that the debtor cannot interplead when the assignee and an attaching creditor claim.³⁵

Where the constitution of a fraternal order provided, that the insurance moneys should be payable to the widow and children, and in addition to the widow a sister set up

³¹ Fuller v. Gibson (1788), 2 Cox 24.

³² Wells v. National (1899), 40 App. Div. N. Y. 498.

³³ German v. Friend (1892), 48 N. Y. St. Rep. 400.

³⁴ Pierce v. Boston (1878), 125 Mass. 593.

³⁵ Venable v. New York Bowery Fire Insurance Co. (1882), 40 N. Y. Supr. Ct. 481.

title under her brother's will, interpleader was refused, because the sister's claim was without any foundation.³⁶

An insurance company was not allowed to interplead, where the insurance moneys were settled by a trust deed, claims being made by the trustees and by the *cestui que trust*, for the reason, that under the deed the company was not bound to see to the application of the money, and could have safely paid to the trustees. It was said, that if interpleader were allowed under such circumstances, it would amount to a decision, that a party paying money to a trustee would be bound to see to its application, and consequently to the execution of the trust however complicated.³⁷

A person desiring to have her life insurance moneys applied to the payment of her funeral expenses, named a woman friend as the person to receive them; subsequently she married, and upon her death her husband, who was also her executor, surrendered the policy and claimed the moneys. The woman friend having also claimed and sued the company, the latter sought an interpleader order, which was denied on the ground that the second claim by the husband was not a conflicting one.³⁸

An insurance company was refused relief, where, on the death of an insured person the moneys were claimed by an assignee under a proper assignment executed by the insured in his life time, and also by the executor whose claim was founded on a letter written by the insured to the company, repudiating the assignment which he had made;³⁹ also, in another case, where in addition to the named beneficiary the policy moneys were claimed by another person who had possession of the policy and had paid the premiums.⁴⁰

A life policy was made payable to a creditor to the extent of his claim, and the balance to the widow. The creditor having sued the insurance company, the latter inter-

³⁶ *Wertheimer v. Independent Order Free Sons of Judah* (1896), 28 App. Div. 64 N. Y.

³⁷ *Glynn v. Locke* (1842), 3 Dr. & War. 11.

³⁸ *Golden v. Metropolitan Life* (1896), 35 App. Div. N. Y. 569.

³⁹ *Stevenson v. New York Life* (1896), 10 App. Div. N. Y. 233.

⁴⁰ *Lennon v. Metropolitan Life* (1897), 45 N. Y. S. 1033.

pleaded, asserting that the widow claimed the whole, but relief was refused as it appeared that the widow did not resist the creditor's right to be paid.⁴¹

Where the applicant was a broker, with whom the first claimant had deposited securities for the due payment of a note endorsed by a third party, and the third party having died, a temporary administrator of his estate also claimed, it was held that interpleader would not lie, because the second claim was not strong enough.⁴²

Where a fund was claimed by an ordinary assignee, and also by a judgment creditor of the assignor, who had taken proceedings to attach the debt but had dropped them, the stakeholder in his affidavit stated that he was advised and believed that the judgment creditor intended to take further proceedings to set aside the assignment, it was held that this was not a sufficient claim.⁴³

Land owned by two tenants in common, which was not in a condition for partition, was sold by the commissioners appointed to make partition or sale, to one of the tenants who subsequently withdrew from his purchase, but remained liable for the deficiency on a re-sale. On a re-sale, the deficiency was \$1,200, and the second tenant in common, over and above his half of the purchase money, claimed that he was entitled to one-half of the deficiency or \$600, out of the proceeds in the hands of the commissioners payable to the defaulting tenant. Upon the commissioners filing a bill of interpleader, it was held that there was no ground upon which it could be maintained, for the second tenant had no legal or equitable claim upon his co-tenant's share of the fund; it was simply an attempt to enforce a supposed equitable demand, and to prevent the payment over of moneys to a rightful owner, as directed by the court, and such is not the office of a bill of interpleader.⁴⁴

⁴¹ *Montague v. Jeweler's* (1890), 58 N. Y. S. 715.

⁴² *Post v. Emmett* (1899), 44 App. Div. N. Y. 477.

⁴³ *Kreiser v. City of New York* (1899), 61 N. Y. S. 320.

⁴⁴ *Michenor v. Lloyd* (1863), 16 N. J. Eq. 38.

After a decree requiring a master to pay over certain proceeds from a sale of property, one of those entitled to a share assigned his interest in the fund. The master refused to pay such share to the assignee, whereupon the assignee and assignor both appeared and offered to receipt for the money, and consented that it should be paid to one or both. The master refused to pay, on the ground that the assignor was incapable of managing his estate, and filed a bill of interpleader. The bill was dismissed on the ground that there was no adverse claim.⁴⁵

Where it was suggested, that there might be an undiscovered child entitled to an estate which was in question, and a bill of interpleader was filed, it was held, that it could not lie, because the claims must be made by two actual persons.⁴⁶

A sheriff is not bound to regard a claim made before execution has been issued, as it has been held, that the claim must be made after process has been issued.⁴⁷

Where it appeared that the bill of sale under which the claimant claimed, was executed after the sheriff had made his seizure, the latter's application for an interpleader order was refused, because the claim was plainly untenable.⁴⁸ It has also been held, that a claim by a *bona fide* purchaser without notice, subsequent to the levy, cannot be the subject of an interpleader.⁴⁹

A sheriff was refused an order, where, having several executions in his hands, he levied and made a sum which was not sufficient to satisfy the execution first in priority, and a claimant appeared who disputed the subsequent executions to which no part of the fund was applicable, but did not dispute the right of the prior creditor.⁵⁰

⁴⁵ Partlow v. Moore (1800), 56 N. E. 317, III.

⁴⁶ Metcalf v. Hervey (1749), 1 Ves. Sen. 249.

⁴⁷ Freeman v. Mountcashel (1849), 12 Ir. L. R. 553.

⁴⁸ Re Sheriff of Oxfordshire (1837), 6 Dowl. 186; but see Allen v. Evans (1833), 3 L. J. Ex. 53.

⁴⁹ Rodgers v. Douglass (1879), 9 W. N. C. Pa. 191.

⁵⁰ Canadian Bank of Commerce v. Bruce (1882), 2 Canada L. T. 92 & 103.

Where mortgagees of land were in possession, at the time the sheriff seized the growing crops, it was held that the sheriff could not interplead, as the mortgagees having taken the land had *prima facie* possession of the crops.⁵¹

Goods in the possession of an assignee under a bankrupt or an insolvent act, cannot be taken in execution, and if the sheriff do seize he cannot interplead, for the court cannot bar the assignee's claim because he is in possession by operation of law.⁵²

Special rule in England.—When a debtor or trustee seeks to interplead, under the section of the English Act, which allows relief when such person has had notice of an assignment of the debt or chose in action, and there are conflicting claims, it is necessary for the applicant to show notice of an *absolute written* assignment before interpleader will lie.⁵³

When claims according to priorities.—If the claimants claim only according to their priorities, and the rights are distinctly set forth, it would seem that the applicant is in no difficulty requiring interpleader.⁵⁴ A tenant's bill was accordingly dismissed, when the defendants answered that they claimed only according to their priorities.⁵⁵ But, if two of the claimants have taken legal proceedings, interpleader will lie, although it may appear that the applicant would be safe in paying the fund in succession until exhausted, because he should not be doubly vexed, by having two legal processes for one debt, going on against him in the name of different persons at the same time.⁵⁶

⁵¹ Bishop v. Hinzman (1833), 2 Dowl. 166; and see also Manning v. Boothe, 14 C. C. Pa. 95.

⁵² McMaster v. Meakin (1877), 7 Ont. Pr. 211; see also chapter XI.

⁵³ 36 & 37 Vict. Imp. c. 66, s. 25, s.-s. 6; In re New Hamburg, etc., Co. (1875), W. N. 239; Lacey v. Wieland (1876), W. N. 24; see also Reading v. School Board (1886), 16 Q. B. D. 686; M'Elheran v. London (1886), 11 Ont. Pr. 181; R. S. Ont. (1897), c. 51, s. 53, s.-s. 6; Buck v. Robson (1878), 3 Q. B. D. 686; Brice v. Bannister (1883), 3 Q. B. D. 569; Ex p. Hall (1878), 10 Chy. D. 615; Fisher v. Calvert (1879), 27 W. R. 301.

⁵⁴ Ter Kulle v. Reddick (1898), 39 Atl. 1062 N. J.

⁵⁵ Blennerhassett v. Scanlan (1828), 2 Moll. 539; Bwoyer v. Pritchard (1822), 11 Price 103.

⁵⁶ School District v. Weston (1875), 31 Michigan 80.

Where several persons asserted claims to a life insurance policy, which was by its terms for the benefit of one of several parties named, according to survivorship, the insurance company was refused relief in an action of interpleader.⁵⁷

In England, in some early cases, the sheriff was refused relief under the Interpleader Act, when the proceeds of his levy were claimed by two creditors, each claiming priority. It was said that he would be justified in paying the first creditor, and so the statute did not apply.⁵⁸ This rule was at first followed in Canada.⁵⁹ The later cases in Ontario provide, that relief will be granted to the sheriff, and an interpleader order has been made where two execution creditors claimed,⁶⁰ as well as where the contest was between an execution creditor and an attaching creditor under the Absconding Debtors' Act.⁶¹ It was said, that the law by its enactments had placed the sheriff in an embarrassing position, and the court should exert itself to extricate him if possible from the confusion arising out of the conflicting claims of those who seek his services.⁶²

When claim a lien.—It is not requisite that the right claimed by the third party should be an absolute right of property. It is enough, that the stakeholder has received notice not to deliver the goods over until a demand made by a claimant in respect of a lien on such goods, has been satisfied.⁶³ Where executors held a mortgage by which a trust had been created in favour of the plaintiff, and a claim was also made by attorneys for a lien thereon, an order for interpleader was granted.⁶⁴

⁵⁷ *Travellers v. Henley* (1895), 96 Hun. N. Y. 524.

⁵⁸ *Salmon v. James* (1832), 1 Dowl. 369; *Day v. Walduck* (1833), 1 Dowl. 523.

⁵⁹ *Wilson v. Wilson* (1859), 2 Ont. Pr. p. 376.

⁶⁰ *Kerr v. Kinsey* (1865), 15 Upper Canada C. P. 681; *Davies v. Smith* (1885), 10 Ont. Pr. 627.

⁶¹ *Leech v. Williamson* (1884), 10 Ont. Pr. 226; *Standard v. Hughes* (1885), 11 Ont. Pr. 220.

⁶² *Standard v. Hughes* (1885), 11 Ont. Pr. 220.

⁶³ *Harwood v. Betham* (1832), 1 L. J. Ex. N. S. 180.

⁶⁴ *Price v. Holman* (1896), 23 Weekly Digest N. Y. 475; 101 N. Y. 683.

Lien in sheriff's cases.—In England, it has been held, that the Interpleader Act comprehends cases of claims of lien, as well as of absolute property. It is to be observed, that in the commercial world, a lien may be equal to the entire value of the goods. A sheriff was accordingly allowed an interpleader order, where a lien was claimed on horses seized for their keep.⁶⁵ In the United States it has been said, that in sheriff's interpleader an order will not be made, when the claimant merely avers a lien, because the sheriff can sell subject to the lien.⁶⁶

Claim withdrawn and another made.—When a first claim has been withdrawn, and a second claim promptly made, an interpleader will be allowed.⁶⁷ Where a sheriff applied for an interpleader order, but his application was discharged with protection, as the claimant, a partner, did not maintain his claim, and afterwards the same claimant set up a different title, claiming as sole owner, the sheriff was awarded the interpleader order.⁶⁸ If a claimant abandon, after an issue has been directed, he cannot claim again.⁶⁹

In a Scotch action of multiplepounding, where it was held that one claimant was not entitled to participate, another claimant, who had claimed upon the footing that the unsuccessful competitor was entitled to a share, was refused permission to have the record opened, so as to enable him to extend his own claim.⁷⁰ In a later case, however, where the fund was still in *manibus curiae*, an unsuccessful claimant tendering another claim upon a new ground, was allowed to do so upon payment of expenses.⁷¹

When claim disappears.—When, before final decree, the cause of apprehension is removed, the bill of interpleader

⁶⁵ Ford v. Baynton (1832), 1 Dowl. 357; Forth v. Simpson (1840), 13 Q. B. 680.

⁶⁶ Brill v. West End Passenger Railway Co. (1876), 4 W. N. C. Pa. 130.

⁶⁷ Laffin v. Suplee (1884), 17 W. N. C. Pa. 157.

⁶⁸ Gaynor v. Salt (1864), 24 U. C. Q. B. 180.

⁶⁹ Menge v. Wiley (1882), 100 Penn. St. 617.

⁷⁰ Graham v. Graham (1868), Ct. of Session, 6 M. 820.

⁷¹ Dymond v. Scott (1877), Ct. of Session, 5 R. 196.

must be dismissed, even though at the time the bill was filed there was some plausible apprehension that the plaintiff would be involved in a two-fold responsibility.⁷² And where the foundation of a claimant's claim disappears, after he has been served, and before the return of the application, he need not and should not appear, as in the case of an assignee of a debtor when the bankruptcy has been put an end to.⁷³

If one claim disappear before an application is made, interpleader will not lie. To enable a sheriff, for instance, to get an order protecting him, he must show that two claims exist, so that an issue may be directed to try the title to the goods; if one claim has disappeared there is no longer any foundation for the remedy.⁷⁴ Nor will interpleader lie, when one claimant has waived all his right to the subject matter, and subsequently makes claim again.⁷⁵ It must always be plainly evident that there is a question to be tried.⁷⁶

When fact that claim made disputed.—When the assertion, that a claim has been made, is disputed, unless the party seeking protection can prove it, no case for interpleader is made out.⁷⁷

⁷² *Kerr v. Union Bank* (1862), 18 Md. 396.

⁷³ *Clarke v. Lord* (1833), 2 Dowl. 55.

⁷⁴ *Sodeau v. Shorey* (1806), 12 T. L. R. 277; 74 L. T. 240.

⁷⁵ *Halberstadt v. Progressive Printing Co.*, 2 Dist. Rep. Pa. 264.

⁷⁶ *Quinton v. Butt* (1860), 5 Ir. Jur. N. S. 130.

⁷⁷ *Cook v. Earl of Rosslyn* (1861), 8 Giff. 175.

CHAPTER VI.

DOCTRINE OF INDEPENDENT LIABILITY.

Independent liability.—The undisputed liability, of the person seeking relief by interpleader, to pay or deliver, to whichever claimant the court may find entitled, is the simple basis of the applicant's right to the remedy. If, however, independently of the title to the subject matter, there is a further liability which he does not admit, then the situation becomes more complicated, and the right to relief less clear. This consideration of triple liability raises the proposition—Is it better that interpleader should lie, and one claimant be obliged to maintain two actions for separate causes, one with the other claimant to determine the ownership of the subject in dispute, and the second with the stakeholder to recover damages independently of the property; than, that the remedy be refused and the stakeholder run the risk of being compelled to pay the same debt twice over, with the vexation of fighting two actions for the same subject matter, one at the suit of each claimant? The early answer to this question was a distinct negative, while the more liberal and modern view is indicated by an affirmative reply. This chapter reviews the decisions bearing upon this important point.

Equitable rule.—The early rule in equity was clear, that interpleader would not lie, if one defendant claimed from the plaintiff the property in question, and also asserted against him a personal claim for damages in addition. This is most frequently referred to as the doctrine of independent liability.¹

¹ See *National v. Platte* (1894), 54 Ill. App. 403.

This rule has sometimes been put in another form, when it is said, that interpleader will be refused when all the rights claimed by the defendants in a bill of interpleader cannot be determined in the litigation between them. In an issue between the adverse claimants, to settle the title to the property in dispute, the personal claim of one defendant against the plaintiff cannot possibly be determined.²

This doctrine has also been described in still another way, when it is said that, interpleader will not be awarded if the claimants' claims are not co-extensive, because when one of the defendants claims the property and damages in addition, and the other the property only, or where one claims two funds and the other but one, the claims cannot be said to be co-extensive, one is more extensive than the other.³

A leading case in England.—The doctrine was clearly enunciated in England in 1837 by the Court of Chancery of that day, as follows: The case tendered by every bill of interpleader ought to be, that the whole of the rights claimed by the defendants may be properly determined by litigation between them, and that the plaintiff is not under any liability to either defendant, beyond that which arises from the title to the property in contest; because, if the plaintiff has come under any personal obligation, independently of the question of property, so that either of the defendants may recover against him at law, without establishing a right to the property, it is obvious that no litigation between the defendants can ascertain their respective rights as against the plaintiff, and the injunction would deprive a defendant having such a case beyond the question of property, of part of his legal remedy, with the possibility, at least, of failing in the contest with his co-defendant, in which event the injunction would deprive him of a legal right without affording him any equivalent or compensation. A party may be induced by the misrepresentation of the

² *Hoggart v. Cutts* (1841), 1 Cr. & Phil. 197; *Browning v. Watkins* (1848), 10 B. & M. (Misc.) 482.

³ *Attenborough v. London* (1878), 3 C. P. D. 450; *Carroll v. Demarest* (1890), 58 N. Y. B. 1028.

apparent owner of property, to enter into personal obligations with respect to it, from which he may be entitled to be relieved by a court of equity, but such a case can not be a subject for interpleader between the real and pretended owners. The plaintiff would be asserting an equity for relief from a personal contract against one of the defendants, with which the other would have nothing to do.⁴

The courts do not encourage the insertion in interpleader bills of long narratives and correspondence, for the purpose of showing that there has been no contract with one of the parties.⁵

Claims beyond fund preserved.—In some cases of independent liability, if the defendants do not seek to have the bill dismissed, an interpleader decree will be made and the plaintiff be protected as to the money paid into court, but he will remain liable to all such proceedings as the defendants may think fit to institute against him, in respect of other matters, such as liability for a further sum over and above that paid into court.⁶

Under Interpleader Act.—Courts of law in England at first refused relief under the Interpleader Act of 1831, if the applicant had incurred a personal liability to either of the contending parties, independently of the question of property, following the rule in equity.⁷

When relation contractual.—The scope of the English Act was further confined, by a somewhat similar rule, that relief would not be granted when any contractual relation existed between the applicant and either of the adverse claimants. Because; when a contract existed, the applicant had given the claimant a personal right against him, and in

⁴ *Crawshay v. Thornton* (1837), 2 Myl. & C. 1.

⁵ *Prudential Insurance Co. v. Thomas* (1867), 3 Chy. App. p. 77.

⁶ *Toulmin v. Reid* (1851), 14 Beav. 499; *Lamon v. McKee* (1889), 7 Mackey D. C. 446.

⁷ *Lawrence v. Matthews* (1830), 5 Dowl. 149; *Patoni v. Campbell* (1843), 12 M. & W. 277; *Baker v. Bank of Australasia* (1857), 1 C. B. N. S. 515; *Lucas v. The London Dock Co.* (1832), 4 B. & Ad. 378; see also *Lazarus v. Harris* (1888), 9 N. S. Wales L. R. 148; *Darcy v. Fielder* (1886), 6 N. S. Wales W. N. 155, overruling *McGuinness v. Bank of N. S. Wales* (1880), 1 N. S. Wales L. R. 97.

the face of a contract, the court would not grant relief, though neither claimant sought special damages but only the right to the subject matter in dispute. This rule was particularly hard on such classes of persons as, bankers, wharfingers, warehousemen, carriers and the like.⁸

After 1860 in England.—After the English Act was amended in 1860 so as to permit interpleader where the titles of the claimants had not a common origin, but were adverse to and independent of one another,⁹ and considering that the Act of 1831¹⁰ gave the courts power to make such rules and orders as to costs and all other matters as might be just and reasonable, the courts took a more liberal view of the remedy, and decided that for the future relief should be awarded although there might be a contractual relation between the applicant and one of the claimants, and this notwithstanding the fact that the applicant might have incurred a personal obligation independently of the question of property.¹¹

Doctrine enunciated in 1878.—In England, in 1878, the doctrine was enunciated as follows:¹² The proper rule of construction under the interpleader statutes, is to grant relief to a person in possession of property, although one claimant in addition to his claim to the property, claims damages for its detention or otherwise, while the second claims only the property. The object of the Act is to prevent a possible double liability to the same person, of being compelled to pay twice over, by directing an issue between the two claimants as to which is entitled to the

⁸ *James v. Pritchard* (1840), 8 Dowl. 800; *Turner v. Mayor of Kendal* (1844), 13 M. & W. 171, 2 D. & L. 197; *Lindsey v. Barron* (1848), 6 C. B. 291; *Horton v. Earl of Devon* (1849), 4 Ex. 497; *Scott v. The Midland Ry.* (1851), 2 Ir. C. L. R. 83; *Poland v. Conll* (1873), 7 Ir. R. C. L. 108; but see *contra Johnson v. Shaw* (1842), 4 M. & G. 916, 12 L. J. C. P. 112; *Crellin v. Leland* (1842), 6 Jur. 783.

⁹ 23 & 24 Vict. c. 126, s. 12.

¹⁰ 1 & 2 Will. IV., c. 58, s. 1.

¹¹ *Meynell v. Angell* (1862), 32 L. J. Q. B. 14; *Best v. Hayes* (1863), 1 H. & C. 718; *Evans v. Wright* (1865), 13 W. R. 468; *Tanner v. European Bank* (1866), L. R. 1 Ex. 261.

¹² *Attenborough v. London* (1878), 3 C. P. D. 450.

subject matter. The fact, that a person in possession of goods has entered into a contract with one of the parties claiming them, does not debar him from obtaining an exercise in his favour of the powers conferred by the interpleader acts. The rule in equity is somewhat narrow. If damages are claimed in addition to the subject matter, the interpleader order must preserve all such claims as a claimant thinks he can enforce. It is true, that one claimant may be exposed to the inconvenience of contesting two suits, one against the other claimant with respect to the title of the property, and the second against the person holding the property with respect to the claim for damages; but it is a less inconvenience than that which the statutes were intended to remove, and the hardship upon the claimant, is not to be compared to that which would otherwise be a hardship upon the person seeking relief.¹³

Where, in pursuance of a written agreement, the two competitors in a trotting match deposited money with the proprietors of a sporting paper, and the latter, by a clause in the agreement, agreed with each of them, that in consideration of a commission of one per cent. on the total amount deposited, he would pay over to the winner a sum of money equal to the stakes deposited less his commission, it was held by the English Court of Appeal, that, under this clause, whether taken by itself or in conjunction with the other clauses of the agreement, no personal liability to pay was undertaken by the proprietor beyond the liability ordinarily undertaken by a stakeholder, and that therefore an interpleader issue was rightly ordered.¹⁴

Sheriff's cases.—When a sheriff in levying an execution enters the premises of a person other than the execution debtor, and there seizes goods, believing erroneously that such goods belong to the debtor, the sheriff may in interpleader proceedings be protected against an action for tres-

¹³ See also *Hurteau v. Ross* (1892), 14 Ont. Pr. 529, cited in argument; *McKenzie v. Aetna* (1879), Russell's Eq. Dec. Nova Scotia 340; *Re Canadian Pacific Ry. & Carruthers* (1896), 17 Ont. Pr. 277; *Re Underfeed Stoker Co. of America, etc.* (1901), 1 Ont. 42.

¹⁴ *Dowson v. Macfarlane* (1899), 81 L. T. 67.

pass to the lands, as well as against an action for seizure of the goods, if no substantial grievance has been done to the person whose premises are wrongfully entered.¹⁵ The Interpleader Act gives the court power to adjust claims, as well as to protect sheriffs, and the court may settle a claim for damages for trespass; if it appears that the sheriff has exceeded his duty the court will leave him liable, if he has acted *bona fide* it will protect him by prohibiting a claimant from bringing an action.¹⁶

Estoppel in interpleader.—Interpleader will not be refused, when one of the claimants has been induced to alter his position through the representation of a defendant in possession of property in question. Although such a defendant may be technically estopped from denying the plaintiff's claim, yet, if a *bona fide* claim is made to the goods by a third person, the court will disregard the technical estoppel and direct an issue between the plaintiff and the claimant.¹⁷ Interpleader will be granted to a defendant sued by one of the claimants, although in the action the defendant who seeks relief would be estopped from setting up the right of the third party, or a *jus tertii* as a defence;¹⁸ nor does it matter, that the plaintiff could, in his action against the stakeholder, give evidence of personal transactions with a deceased person, which he would not be permitted to give as against the other claimant, the administrator.¹⁹

In England an attempt was made in 1899 to abrogate the rule, with the result that the Court of Appeal followed and confirmed it. Wharfingers, with whom goods were stored, had written a letter to a bank, stating, that at the request of the owner they held the goods thereafter to the

¹⁵ *Smith v. Critchfield* (1885), 14 Q.B.D. 873.

¹⁶ *Winter v. Bartholomew* (1856), 25 L. J. Ex. 62. Some earlier decisions are to the contrary: *Hollier v. Laurie* (1846), 3 C. B. 334; *Abbott v. Richards* (1846), 15 M. & W. 194; see also *De Coppett v. Barnett* (1901), 21 Times L. R. 273.

¹⁷ *Attenborough v. London* (1878), 3 C. P. D. 450.

¹⁸ *Robinson v. Jenkins* (1890), 24 Q. B. D. 275.

¹⁹ *Flanery v. Emigrant Savings Bank* (1889), 23 Abb. N. C. N. Y. 40; see also *Meynell v. Angell* (1862), 32 L. J. Q. B. 14.

bank's order, and on the faith of this statement the bank advanced money on the goods. Subsequently, the first bank and another bank both claimed the goods adversely, and the wharfingers interpleaded. It was held, even assuming that the letter constituted an estoppel, that nevertheless an order should be made restraining the claimants from proceeding against the wharfingers in respect of their claims, excepting however any claim which the first bank might have upon the letter for damages, and an issue was directed between the two banks to determine to which of them the goods belonged. It was pointed out, that the authorities, the history of the law on the subject of interpleader, and the modifications which have taken place, show, that eminent judges have been of opinion that the scheme of legislation has been to remove the restrictions, which existed before the common law Procedure Act of 1860, and to give a wider jurisdiction to the courts. The fact, that an applicant would be estopped from denying the title of one claimant, does not limit the jurisdiction of the court to award relief when a second claimant appears, and under such circumstances there is no reason why the existence of the estoppel should, in the matter of discretion, prevent the court from granting relief. As a further reason in support of the order, it was pointed out, that if the claimant alleging the estoppel succeeded on the issue that would be an end of the matter; and if he failed, it would still be open to him to assert any claim which he might have against the applicant for the value of the goods, as in the old action of trover, or for any other damage arising from a conversion of the goods.²⁰

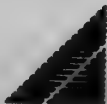
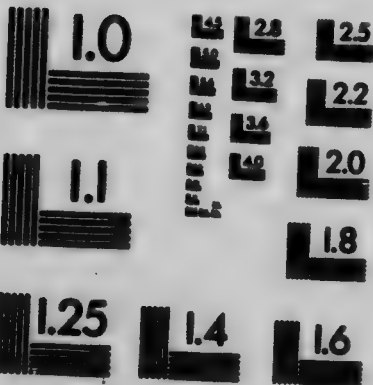
In Kansas, it has been pointed out, that the code vests in the court, to which application is made by a defendant for substitution of a third party in his place, a legal discretion to grant or refuse the application, and where the substitution will prejudice the rights of the plaintiff, the discretion in the court will not be abused, if the application

²⁰ *Ex p. Mersey Docks and Harbour Board* (1890), 1 Q. B. 546.



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be denied, but if the rights of the plaintiff will not be injured by having to contend with the third party, the court, it has been held, should permit the substitution within the terms of the statute.²¹

Rule in the United States.—In the United States, the rule laid down so clearly in England in 1837 was adopted, and is still followed, notwithstanding its subsequent broadening in the mother country. It is essential therefore, that the party seeking relief must have incurred no personal or independent liability to either claimant, beyond that which arises to the title of the thing in contest; while it must also appear, that there is nothing else to be litigated, except the rights of the different claimants to the thing in question. If the whole of the rights claimed cannot be determined in a litigation between the claimants, interpleader will be refused.²² The applicant must stand perfectly indifferent between the claimants in the position of a mere stakeholder.²³

The independent liability which will deprive a depositary, of the right to require rival claimants to interplead, may arise, either by express acknowledgment of the title of one of the claimants, or out of such contractual relations as will bind him, as upon an independent undertaking, without reference to his possible liability to the other claimant.²⁴

²¹ *Wafer v. Harvey County Bank* (1887), 36 Kansas 292.

²² *Hastings v. Cropper* (1867), 3 Del. Ch. 165; *Tyus v. Rust* (1868), 37 Ga. 374; *National v. Platte* (1894), 54 Ill. App. 483; *Chicago Edison Co. v. Fay* (1896), 64 Ill. 323; *Sprague v. Soule* (1876), 35 Mich. 35; *Cullen v. Dawson* (1877), 24 Minn. 66; *Browning v. Watkins* (1848), 10 S. & M. (Miss.) 482; *Whitney v. Cowan* (1878), 55 Miss. 626; *Ter Kille v. Reddick* (1898), 39 Atl. 1062 N. J.; *Wakeman v. Kingsland* (1889), 46 N. J. Eq. 113; *Ludlow v. Strong* (1895), 53 N. J. Eq. 376; *Oppenheim v. Leo Wolf* (1846), 3 Sand. Ch. N. Y. 571; *Sherman v. Partridge* (1855), 11 How. N. Y. 154; *Fletcher v. Troy* (1857), 14 How. N. Y. 383; *Holmes v. Clark* (1873), 46 Vt. 22; *Burhop v. Milwaukee* (1864), 18 Wis. 453; *Nichols v. Burnham* (1887), 21 W. N. C. Pa. 153.

²³ *Kyle v. Mary Lee Coal & Ry. Co.* (1896), 112 Ala. 606.

²⁴ *National v. Platte* (1894), 54 Ill. App. 483; *Sherman v. Partridge* (1855), 11 How. N. Y. 154; *Lincoln v. Rutland* (1832), 24 Vt. 630.

Where, therefore, there is an independent liability of the party seeking relief to one of the claimants, arising out of the special relation subsisting between them, creating for example the relation of bailor and bailee, landlord and tenant, principal and agent, or creditor and debtor, interpleader will not lie. When the applicant has placed himself in such a position that he is estopped from disputing the title which has been given to him, he must defend it in the ordinary way, even though a title paramount to that under which he received is asserted; he cannot cause his principal and the holder of such a title to interplead. There can be no interpleader, unless it be made to appear that others have acquired a title or interest derived under the same authority.²⁵

Where moneys for the erection of a building were claimed by the administrator of the contractor who had been killed, and by a firm which had supplied the contractor with material, it was said, that as between the two the owner of the building was not an indifferent person. He had entered into a contract and had bound himself to pay a certain sum upon the performance of certain services.²⁶

Interpleader has been refused in the United States, applying this rule to many classes of persons liable on contracts,²⁷ as a common carrier liable to one claimant on his bill of lading;²⁸ a purchaser liable to pay his purchase money under his contract with the vendor;²⁹ a warehouseman on the receipt issued for goods,³⁰ and a bank liable on a deposit certificate.³¹ Such class of cases may also be defective on the ground of want of priority between the claimants, but will be proper for interpleader if the adverse claim is under a derivative title.³²

²⁵ *Fairbanks v. Belknap* (1883), 135 Mass. 179; *Richardson v. Belt* (1898), 13 App. Cas. D. C. 197.

²⁶ *Richardson v. Belt* (1898), 13 App. Cas. D. C. 197.

²⁷ *Commercial National Bank of Peoria v. Newman* (1894), 55 Ill. App. 534.

²⁸ *McGaw v. Adams* (1857), 14 How. N. Y. 46.

²⁹ *Trigg v. Hits* (1864), 17 Abb. Pr. N. Y. 436.

³⁰ *Tyus v. Rust* (1868), 37 Ga. 574.

³¹ *Wells v. Miner* (1885), 25 Fed. Rep. Cal. 533.

³² *Crawshaw v. Thornton* (1837), 2 Myl. & C. 1.

Modern tendency to modify rule.—As a contractual relation is a necessary and ordinary incident, in the variety of commercial and other transactions which are constantly taking place, the modern tendency of some of the American courts, seems to be to modify this narrow rule, adopted from the English system of equity, as much as possible, when conflicting claims to property in the possession of a depositary are merely for the subject matter, and not for special damages in addition. Thus a bank has been allowed interpleader as against its depositor,³³ and also against the holder of a special certificate of deposit.³⁴ The maker of a promissory note has been allowed to call upon the holder to interplead with a third party.³⁵ A loan company has been allowed to interplead its borrower, the mortgagor, with a third party;³⁶ and a railway company the holder of the bill of lading, with the person in whose name it was made out.³⁷

The fact that the applicant, upon money being left with him for one of the claimants, notifies such claimant of the fact, does not create an independent liability which takes away the right to interplead, when the same money is claimed by another party.³⁸ Where a bank had recognized one of the claimants as the owner of certain stock in dispute, and had paid him dividends thereon, it was held, that this did not bind it to anything in the future, and did not come within the rule that an independent liability had been incurred to one party.³⁹

Code provisions.—Many of the American States have abrogated, by their Code provisions, the narrow rule of equity above referred to, which still governs in actions

³³ *City Bank of New York v. Skelton* (1846), 2 Blatchf. N. Y. 14.

³⁴ *First National Bank v. West* (1874), 46 Vt. 633.

³⁵ *Howe v. Gifford* (1873), 66 Barb. N. Y. 507; *Bechtel v. Shenfer* (1898), 117 Pa. St. 555.

³⁶ *Franco v. Joy* (1894), 56 Mo. App. 433.

³⁷ *Brock v. Southern Railway Co.* (1895), 44 S. O. 444.

³⁸ *National v. Platte* (1894), 54 Ill. App. 483.

³⁹ *Cady v. Potter* (1860), 55 Barb. N. Y. 463.

of interpleader, by declaring that statutory interpleader shall lie in favour of a defendant, although he is sued upon a contract. Thus, in New York, the code provides among other cases that, a defendant against whom an action to recover upon a contract is pending, may upon proof that a person not a party to the action makes a demand for the same debt, apply to the court, etc.⁴⁰

In Alabama it has been held that, the statute does not abrogate or impair the rights of a bailor, nor the duties of the bailee, other than to give the bailee the right to require the claimants to interplead.⁴¹

⁴⁰ See *San Francisco v. Long* (1898), 55 Pac. (Cal.) 709.

⁴¹ *Powell v. Robinson* (1884), 76 Ala. 423.

CHAPTER VII.

THE APPLICATION AND PROCEDURE.

Bill of interpleader.—A person seeking relief by way of interpleader in a suit or action, following the early equitable practice, commences his proceedings by stating the necessary facts, and praying the usual relief, in a bill of complaint, commonly known as a bill of interpleader, to which is annexed an affidavit of no collusion. The bill when completed is filed and served on each of the defendants.

A plaintiff's first object, after filing and serving his bill, is to obtain the usual injunction or stay of proceedings. In some cases without waiting for the appearance of the defendants, he may, upon supporting the allegations in his bill by an affidavit, obtain *ex parte* an injunction, upon paying the fund into court. If any injustice is apparent, a defendant upon appearing may move to dissolve, but as a general rule the court will continue the injunction until the hearing. Or the plaintiff may move, upon notice, either before or after the defendants have appeared, and the injunction will be granted almost as a matter of course.¹

After the plaintiff has obtained his injunction, the general practice is, at an early stage and in a summary way, to dispose of the propriety of filing the bill. The defendants therefore come in on motion, and state their respective claims with or without affidavits according to the circumstances. If the defendants do not deny the statements, in the bill, an interpleader decree will at once be made, that the defendants proceed to litigate their rights, the plaintiff withdrawing from the suit and provision being

¹ See Chapter VIII.

made for his costs. Most interpleader bills are disposed of in this way, and few are brought to a hearing. A defendant will not generally be ordered to interplead, until he has put in his answer, or the bill has been taken *pro confesso* against him. If a defendant deny the allegations in the bill, the suit will then have to go on to a hearing.²

A defendant may demur to the bill, and possibly establish that the plaintiff has not shown a case entitling him to relief;³ or the defendants may deliver answers, setting out their claims, and if that be done, no other evidence of the facts need be produced to entitle the plaintiff to a decree.⁴ A defendant, however, is not obliged to challenge the insufficiency of a bill by demurrer, but may answer it and rely upon the want of evidence.⁵ By going to a hearing upon the merits, a defendant waives formal and technical objections which might have been taken upon demurrer.⁶

At the hearing, the regular practice is, to determine first whether interpleader will lie, because if it does not, it will then be unnecessary to go further, for the defendants have no contention as between themselves upon the record.⁷ The plaintiff continues to be a substantial and necessary party until he has fully rendered the debt, duty, or thing required of him, and the court will not require the defendants to interplead until the money is either in court or subject to its order,⁸ but as soon as a decree is made the plaintiff has done with it.⁹

² *Yates v. Tisdale* (1837), 3 Ed. Ch. N. Y. 71; *East & West India Dock Co. v. Littledale* (1848), 7 Hare 57; *Australian v. Broadbent* (1877), 3 Victorian L. R. 138; *Glasner v. Weisberg* (1891), 43 Mo. App. 214. In the Scotch action of multiplepoinding, if the process is objected to, such objection is the first matter to be disposed of, and until that be done no order for claims can be produced. *Connell v. Ferguson* (1861), Ct. of Session, 23 D. 683; see also *Crokat v. Lord Panmure* (1853), Ct. of Session, 15 D. 737.

³ *Toulmin v. Reid* (1851), 14 Beav. 400.

⁴ *Balchen v. Crawford* (1844), 1 Sandf. Ch. (N. Y.) 380.

⁵ *Partlow v. Moore* (1900), 56 N. E. 317 (Ill.).

⁶ *Cobb v. Rice* (1881), 130 Mass. 231.

⁷ *Cullen v. Dawson* (1877), 24 Minn. 66; *North Pacific v. Lang* (1895), 42 Pac. (Or.) 790.

⁸ *George v. Pilcher* (1877), 28 Gratt. (Va.) 299; *Home Life Ins. Co. v. Caulk* (1897), 86 Md. 385.

⁹ *Jennings v. Nugent* (1828), 1 Moll. 134; *Anon* — (1885), 1 Vern. 351.

The decree.—The only decree which the plaintiff is interested in obtaining, is, that his bill is properly filed, giving him leave to bring the property into court, allowing him his costs out of the fund, restraining all pending or threatened actions, and directing the defendants to interplead, and so to settle the conflicting claims among themselves.¹⁰

When the defendants assent to a decree of interpleader, and that decree has put the first stage of the case at rest, and whether it may be said to be technically a proper case for interpleader or not, the court will treat it as proper.¹¹

The failure of a defendant to answer a bill, until after an interlocutory decree has passed declaring that he has no interest because he does not appear, does not preclude him from asserting his claim at any time before a final decree is made.¹²

The plaintiff may read the answer of one defendant against the other defendant, in order to show that adverse claims have been brought forward, sufficient to entitle him to maintain his bill, and the court will not then put him to other proof of his allegations.¹³

A defendant may show at the hearing, that the cause is not a proper one for interpleader, and it is not too late that the objection was not taken by demurrer, or upon the motion to pay in,¹⁴ and one defendant may read the answer of the other.¹⁵

If at the hearing, the questions between the defendants are also ripe for decision, the court will determine the whole matter and pronounce a final decree, disposing at once of

¹⁰ *Fairbrother v. Nerot* (1818), 1 Dan. 68; *Catherall v. Davies* (1859), 1 Giff. 326; *Hoggart v. Cutts* (1841), 1 Cr. & Phil. p. 206; *Atkinson v. Manks* (1823), 1 Cow. N. Y. 691; *Owings v. Rhodes* (1886), 65 Md. 408; *Willison v. Salmon* (1889), 45 N. J. Eq. 257; *Wakeman v. Kingsland* (1889), 46 N. J. Eq. 113.

¹¹ *McFadden v. Swinerton* (1900), 59 Pac. 816 (Or.).

¹² *Heald v. Rhind* (1897), 86 Md. 320.

¹³ *Masterman v. Price* (1847), 1 Cooper 383; *Balchen v. Crawford* (1844), 1 Sandf. ch. 380 N. Y.; *Morrill v. Manhattan* (1898), 82 Ill. App. 410.

¹⁴ *Toulmin v. Reid* (1851), 14 Beav. 499.

¹⁵ *San Francisco Savings Union v. Long* (1896), 55 Pac. Rep. 700 Cal.

the whole case and the rights of all parties. But, if they are not ripe, the court directs an issue or a new action, or that one claimant defend an action already commenced, with or without a jury, or a reference is sent to a master, as may be best suited to the nature of the case, preserving the suit for further consideration.¹⁶ It is not necessary, therefore, for the defendants to enter into evidence as against each other in the interpleading suit.¹⁷ After an action or an issue is directed, the claimants stand before the court to litigate the question of right pending between them, to the same extent as if one had filed a bill against the other.¹⁸ They occupy as between themselves the position of plaintiff and defendant, and a sworn denial by one of them of the allegations of a cross bill filed by the other, has the same effect, in evidence, as though contained in an answer to an original bill.¹⁹

Modern action of interpleader.—The steps in a modern action of interpleader are analogous to those in an interpleading suit in chancery. In New York State, however, the plaintiff in such an action cannot move for an injunction, until the defendants have put in their defence.²⁰ The proceeding is thus described in a recent California decision:—In such cases, there may always be a two-fold contest, (1) As to the right of the plaintiff to bring the suit, and to force the defendants to interplead, and (2) if such right is maintained, the litigation among the defendants.

¹⁶ *Goddard v. Leech* (1833), Wright, Ohio, 476; *Yates v. Tisdale* (1837), 3 Ed. Ch. N. Y. 71; *East & West India Dock Co. v. Little-dale* (1848), 7 Hare 57; *North Pacific Lumber Co. v. Lang* (1895), 42 Pac. Rep. 790 Or.; *Perkins v. Trippe* (1869), 40 Ga. 225; *Condict v. King* (1861), 13 N. J. Eq. 375; *Owings v. Rhodes* (1886), 65 Md. 408; *First National Bank of Battleboro v. West River Ry. Co.* (1874), 46 Vt. 633; 3 Albany Law Journal, p. 492; but see *Luscombe v. Callaghan* (1828), 1 Moll. 204. For form of decree, see *Morrill v. Manhattan* (1898), 82 Ill. App. 410.

¹⁷ *Thames v. Nash* (1832), 5 Sim. 280.

¹⁸ *Horton v. Baptist Church* (1861), 34 Vt. 309; *Rowe v. Hongland* (1848), 7 N. J. Eq. 131; *Willison v. Salmon* (1889), 45 N. J. Eq. 257.

¹⁹ *Penn Mutual Life Ins. Co. v. Union Trust Co.* (1897), 83 Fed. Rep. 801 Cal.

²⁰ *Washington v. Lawrence* (1865), 28 How. Pr. 435 N. Y.

There may be two sets of pleadings, (1) those having reference only to the right of the plaintiff to maintain his action, and (2) the several complaints of the defendants, in which their respective rights to the subject in controversy are set up. These may be, and usually are, included in the answer to the plaintiff's complaint. Such answer is then in the nature of a cross-complaint, and should be served upon each defendant, who may answer the same. Whether the plaintiff will be permitted to maintain such an action is first determined, and if his right is sustained, an interlocutory decree is entered, requiring the defendants to litigate their claims among themselves.²¹

Form of application under Interpleader Acts. — Under interpleader statutes and codes, the applicant's proceeding is much simpler and more expeditious, and also less costly, than an interpleading suit in chancery, or a modern action of interpleader. In England, the form of the application is by summons, in Ontario by notice of motion, and in Pennsylvania by petition and rule, calling upon the claimants to appear and state the nature and particulars of their claims, and either to maintain or relinquish them.²²

In British Columbia the summons must be an originating summons, and where a person seeking the favour of the court, took out an ordinary summons in chambers, his application was dismissed.²³

Although a settled form of interpleader summons has long been used,²⁴ one calling on the parties to appear before the court in order that it may exercise its jurisdiction on the adjustment of the several claims, has been held sufficient in its terms.²⁵

The claim made by the claimant in sheriff's interpleader is, in England, regarded as the institution of proceedings,

²¹ *San Francisco Savings Union v. Long* (1898), 55 Pac. Rep. 709 Cal.

²² See appendix.

²³ *In re Tom Hong Grew* (1898), 134 Can. L. J. 393 (B.C.).

²⁴ *Alexander v. Connell* (1848), 11 Ir. L. R. 325.

²⁵ *Frost v. Heywood* (1843), 2 Dowl. N. S. 801.

in considering questions between the creditor and the claimant.²

How application entitled.—If the applicant has not been sued his summons or notice may be entitled:—"In the matter of an application by A. B. for leave to interplead. Between C. D. and E. F. claimants," or simply "In the matter of A. B. applicant and C. D. and E. F. claimants." If an action has been commenced the application should be made and entitled in the action.²³ Thus "Between A. B. plaintiff and C. D. defendant and E. F. claimant." A sheriff's proceeding, which ordinarily arises out of an action, is generally entitled, "Between A. B. plaintiff and C. D. defendant; and between E. F. claimant and the said A. B. execution creditor and the sheriff respondents. If there be more than one action or matter pending affecting the applicant, the application should be entitled in them all."²⁴

It has been held in Ontario, if no action or matter be pending, that the proceedings may be entitled in any Division of the High Court;²⁵ and where before the Judicature Act, a sheriff applied in the Court of Queen's Bench upon two executions, issued out of the Queen's Bench and in Chancery respectively, and the Queen's Bench execution was set aside, it was held, that the Queen's Bench Judge had still jurisdiction to continue the proceedings, and to make an interpleader order.²⁶

Parties to application.—The applicant joins in his application all persons who have made claims and serves them all with his summons, notice of motion, or petition as the case may be.²⁷

Service.—The summons, notice of motion, or petition, must be duly served on the parties called on to appear,

² *Nunn & Co. v. Tyson* (1901), 17 Times, 624.

²³ *Reading v. London School Board* (1886), 16 Q. B. D. 690; *Wagner v. Hower* (1881), 12 W. N. C. Pa. 304.

²⁴ Eng. Order LVII., r. 14; Ont. Rule 1117.

²⁵ See *Hogaboon v. Grundy* (1894), 16 Ont. Pr. 47.

²⁶ *Holdan v. Beatty* (1878), 43 Upper Canada Q. B. 614.

²⁷ See Chapter IV.

otherwise no order can be made against them;³⁰ but the omission to serve a claimant is an irregularity which is cured by his appearance.³¹ If a summons, through some fatality, is not served on the claimant, a new order must be obtained;³² and when no judge is in chambers on the return day, the matter cannot be heard on the first day a judge is present, without a fresh notice to the claimant, when the latter did not appear the first day.³³ Service upon the agent of the execution creditor's solicitor has been allowed in a sheriff's case,³⁴ but two attempts to serve a claimant, and service finally on his wife has been held insufficient.³⁵ Leave will be granted to serve a foreign claimant residing out of the jurisdiction.³⁶

The applicant's affidavit.—The interpleader application must be supported by an affidavit, which will satisfy the court that it is a proper case in which to grant relief. The applicant should make the affidavit himself, if possible. The English practice requires him to show that he claims no interest in the subject-matter, other than for charges and costs, that he does not collude with any of the claimants, and that he is willing to pay or transfer the subject matter into court, or to dispose of it as the court may direct.³⁷

Sheriff's affidavit.—In England, a sheriff need not, as a general rule, file an affidavit, and if he do he will not be allowed the costs of it. It has been said that the affidavit is a mere form, as no one can suppose that the sheriff can have a personal interest in the matter. The proper thing for him to do is to wait till he sees if an affidavit is necessary, then he can obtain an enlargement and file one.³⁸

³⁰ *Burleigh v. England* (1838), 1 *Arnold* 106; *Alexander v. Connell* (1848), 11 *Ir. L. R.* 325; *Anon* — (1848), *Bl. D. & O.* 264; but see *Barker v. Pettigrew* (1852), 4 *Ir. Jur. O. S.* 270.

³¹ *Maslin v. Casey* (1882), 1 *New Zealand L. R.* 138.

³² *Henry v. Mulligan* (1867), 1 *Ir. L. T. & Sol. J.* 262.

³³ *Kennedy v. Lavan* (1884), 18 *Ir. L. T. R.* 5.

³⁴ *Phillips v. Spry* (1832), 1 *L. J. Ex.* 115.

³⁵ *Lambert v. Townsend* (1832), 1 *L. J. Ex.* 113.

³⁶ See Chapter IV.

³⁷ *Eng. Order LVII.*, r. 2; *Ont. Rule 1104*; see also *Butler v.* — (1833), 3 *L. J. C. P.* 62, and under "Claims" and "Collusion."

³⁸ *Stocker v. Heggerty* (1892), 67 *L. T.* 27.

In Ontario, where the application is by notice of motion, the sheriff always files an affidavit. It is of some importance that his affidavit should show as clearly as possible, where the goods were seized and who was in possession at the time. The court requires this information in determining upon which claimant the onus of proof should rest. In the High Court when the value of the goods does not exceed \$400, the affidavit must contain a list of the goods, and of the value placed upon them.³⁹

Where a sheriff did not show that the goods seized were the property of the defendant, or that the sheriff believed them to be so, or any facts that would warrant their seizure as the defendant's, and did not state that the goods were in the possession of the sheriff, or that he had the proceeds, his affidavit was held clearly insufficient.⁴⁰

Where application is made.—Under the English and Canadian practice the application is generally made to a Master of the High Court in Chambers, who has all the jurisdiction in interpleader which a judge at chambers possesses. The rules say that the applicant shall satisfy the court or a judge.⁴¹ Applications are seldom made to a judge, or to the court. In England, a District Registrar now has, in matters arising in his own county, the same jurisdiction in interpleader as the master in London;⁴² but it has been said that this does not give jurisdiction when no action is pending.⁴³ In Ontario Local Masters and County Court Judges have concurrent jurisdiction in interpleader with the Master in Chambers at Toronto.⁴⁴

Ontario County Court.—In Ontario, a stakeholder may apply for relief in the County Court in which he is sued,

³⁹ Ont. Rule 1125 (2); *Close v. Exchange Bank* (1885), 11 Ont. Pr. p. 192.

⁴⁰ *Freehold Loan & Savings Co. v. Bryson* (1891), 27 Canada L. J. 120 (Man.).

⁴¹ Eng. Order LVII., r. 2; Ont. Rule 1104.

⁴² Eng. Rule 2 of Aug. 1894. See decision before rule was passed. *Hord v. Yates* (1893), W. N. 190.

⁴³ *Snow's Annual Practice*, 1901, p. 452.

⁴⁴ Ont. Rules 45 and 49; *Coulson v. Spiers* (1863), 9 Ont. Pr. p. 492.

and if no suit is pending, and the subject matter does not exceed \$200 in value, he may apply in the County Court of the county in which he resides, or in which the subject matter is situate, while a sheriff who has taken goods under a County Court execution may apply in the County Court of his own county, although the writs are from other counties.⁴⁵ If goods are seized under a County Court writ, and a High Court writ is afterwards placed in the sheriff's hands, he must interplead in the High Court.⁴⁶ The District Courts in Ontario have also jurisdiction in interpleader.⁴⁷

If neither claimant appear.—Upon the return of the application, if neither of the claimants appear, the action against the applicant, if any, will be stayed, he obeying the order of the court as to the disposal of the property, after satisfying his lien for costs. A sheriff will sell sufficient to satisfy his poundage and expenses, and then abandon the rest.⁴⁸ The claimants will be barred, as against the applicant, and persons claiming under him, but the order will not affect the rights of the claimants as between themselves.⁴⁹ Bar signifieth legally a destruction forever, or the taking away for a time, of a person's right of action.⁵⁰

If one claimant appear.—If one claimant having been duly served do not appear, he will be barred,⁵¹ and if he is a plaintiff claimant, his action against the applicant will be stayed⁵² and the claimant appearing will take the fund or other subject matter, upon satisfying the applicant's costs, but all this will not prejudice the rights of the claimants between themselves.⁵³

⁴⁵ Ont. Rule 1123. For decisions before Rule 1123, see *In re Anderson v. Barber* (1889), 13 Ont. Pr. 22; *In re Gould v. Hope* (1893), 20 Ont. App. p. 361.

⁴⁶ *Strange v. Toronto* (1879), 8 Ont. Pr. 1.

⁴⁷ Ont. Rule 6 (5); *Isblister v. Sullivan* (1888), 9 Canada L. T. 3.

⁴⁸ *Everligh v. Salisbury* (1836), 3 Bing. N. S. 298; 5 Dowl. 309.

⁴⁹ Eng. Order LVII., r. 10; Ont. Rule 1108.

⁵⁰ Co. Litt. 372 a.

⁵¹ *Johnson v. Baldwin* (1844), 1 Upper Canada Q. B. 280.

⁵² See Chapter VIII.

⁵³ *Hodges v. Smith* (1797), 1 Cox 357; *Stevenson v. Anderson* (1814), 2 Ves. & B. 410, 13 R. R. 126; *Aymer v. Gault* (1830), 2 Pal. N. Y. 284; *M'Elroy v. Baer* (1886), 13 Daly N. Y. 442; *Wells v. Hews* (1876), 24 Grant (Ont.) 131.

As a bill of interpleader admits the indebtedness of the plaintiff, when one of the claimants withdraws all claim to the fund, a decree in favour of the other goes as a matter of course.⁵⁴

If an adverse claimant, in a sheriff's case, appear, but the execution creditor do not, the sheriff will be ordered to withdraw, or to deliver up the goods to the claimant, and will be protected from any action.⁵⁵ If the claimant do not appear, he will be barred, and the sheriff will proceed to enforce the execution.⁵⁶ But where an order had been made barring the claimant, and it had not been taken out, the claimant was allowed in on showing that the court had entertained an erroneous view of the facts.⁵⁷

If one claimant do not appear, but two or more others do, the question will be settled between such as do appear.⁵⁸

Obligation on claimant appearing.—If a claimant appears, but neglects or refuses to comply with any order made after his appearance, he will be barred as against the applicant.⁵⁹ A claimant who was ordered to file his own affidavit and neglected to do so was barred;⁶⁰ and when an order provides that a foreign plaintiff shall give security for costs, it will be conditioned, that upon default he shall be barred.⁶¹

When a claimant appears, he must say whether he will take an issue or not, and if he decline to take an issue he will be barred.⁶² Pending the enlargement of an interpleader motion, an order was made to wind up the defendant company, but the court refused to substitute the liquidator, for the execution creditor, saying that the latter

⁵⁴ *Knight v. Yarborough* (1846), 7 S. & M. (Mss.) 179.

⁵⁵ *Doble v. Cummins* (1837), 7 Ad. & E. 590; *Donniger v. Hinxman* (1833), 2 Dowl. 424; *Ford v. Dilly* (1833), 5 B. & Ad. 885.

⁵⁶ *Bowdler v. Smith* (1832), 1 Dowl. 417; *Perkins v. Burton* (1833) 2 Dowl. 138, 3 Tyr. 51.

⁵⁷ *Re Roberts, Evans v. Thomas* (1887), W. N. 23.

⁵⁸ *Gethin v. Wilkes* (1833), 2 Dowl. 189.

⁵⁹ Eng. Order LVII., r. 10; Ont. Rule 1108.

⁶⁰ *O'Brien v. Sage* (1893), 14 Canada L. T. 76.

⁶¹ *Ellis v. Cheeseboro* (1894), 14 Canada L. T. 292.

⁶² *Hoban v. Munro* (1867), 1 Ir. R. C. L. 505; *Waterhouse v. Barry* (1873), 7 Ir. L. T. & Sol. J. 429; *Plunkett v. Kearney* (1876), 10 Ir. L. T. & Sol. J. 47; Ont. Rule 1108.

must either take an issue or be barred.⁶⁵ Where a claimant desired to be barred for the purposes of the interpleader only, it was held, that if to be barred at all, he must be barred wholly, the bar must not be limited to the purposes of the interpleader.⁶⁶

Execution creditor claiming or abandoning.—If an execution creditor abandon his process against the goods, the sheriff has still a right for his own protection to show that the goods were the property of the defendant.⁶⁷

It was formerly held, when a sheriff had seized without special instructions, that the execution creditor was entitled to have an opportunity of examining the claimant's affidavit, before being required to take an issue, and then to abandon without being liable for costs.⁶⁸ Now, under the English and Ontario practice, a sheriff is entitled, when a claim is made, to instructions from the execution creditor as to whether he admits or disputes the claim, and if none are given, or the claim is disputed, the sheriff can interplead, and on the return of the application the execution creditor cannot abandon without being liable for such costs as the court may consider just and reasonable.⁶⁹

Claimant's affidavit.—If both parties appear upon a stakeholder's application, they must each be prepared to support their claims by affidavit, and so must the adverse claimant upon a sheriff's application.⁷⁰ In Pennsylvania, however, the claim if made in good faith need not be supported by an affidavit;⁷¹ but if the goods be in the exclusive possession of the execution debtor, the claimant may be required to file a specific affidavit of his claim, before an issue will

⁶⁵ *Blake v. The Manitoba Milling Co.* (1891), 8 Man. 427.

⁶⁶ *Doran v. Toronto Suspender Co.* (1890), 14 Ont. Pr. 104.

⁶⁷ *Baynton v. Harvey* (1835), 3 Dowl. 344.

⁶⁸ *Smith v. Craig* (1866), 16 Ir. C. L. R. App. V.; *Wilkins v. Peatman* (1877), 7 Ont. Pr. 84; *Canadian Bank of Commerce v. Tasker* (1880), 8 Ont. Pr. 351; *Vanstaden v. Vanstaden* (1884), 10 Ont. Pr. 428.

⁶⁹ Eng. Order LVII., rr. 16 and 17; Ont. Rules 1115, 1116.

⁷⁰ *Campbell v. Conway* (1855), 7 Ir. Jur. O. S. 200; *Powell v. Lock* (1835), 3 Ad. & Ell. 315.

⁷¹ *Waterman v. Langdon* (1882), 39 L. J. Pa. 373.

be awarded.⁷⁰ It has also been held in Pennsylvania, that a formal statement must be filed by the claimant in a sheriff's case, the claim filed with the sheriff is an insufficient statement, when an issue is to be ordered.⁷¹

The affidavits should be entitled in the action if any.⁷² They may however be entitled in the same way as the applicant's summons, notice of motion, or petition.

A claimant's affidavit should show shortly the ground of the claim. It is only necessary to make out that there is a fair or *prima facie* claim. The claimant need not expose his full case, and the court will not go into the merits, or try the question of ownership, except in the cases to be presently mentioned.⁷³ A claimant should not put in affidavits to support his title as against the other claimant.⁷⁴ It is sufficient, if a claimant allege ownership and exclusive possession, he need not set out his title to the goods, nor the source of his title.⁷⁵ The affidavit should, however, give full particulars of what is claimed, otherwise the claimant runs the risk of an order confining his right to what his affidavit demands.⁷⁶

It should be remembered, that the claimant in a sheriff's case does not come to answer the sheriff's affidavit, but to substantiate his own claim.⁷⁷ A claimant cannot appear by counsel and object to a sheriff's right to interplead, before he has legally filed his claim by affidavit. It is not sufficient that he appear by counsel, and that upon affidavits made by other parties it appears that he has given formal notice of his claim to the sheriff.⁷⁸

⁷⁰Burk v. Wallace, 4 Del. Pa. 5; 5 Kulp. Pa. 227.

⁷¹Provost v. Algoe (1899), 8 Pa. Dis. R. 517.

⁷²Pariente v. Pennell (1844), 7 Sc. N. R. 834; Levi v. Coyle (1843), 2 Dowl. N. S. 932.

⁷³McGuinness v. Bank of N. S. Wales (1880), 1 N. S. Wales L. R. 97; Gourlay v. Ingram (1869), 2 Ont. Chy. Chamb. 238.

⁷⁴Pratt v. Myers (1892), 28 Abb. N. C. N. Y. 400.

⁷⁵Kurts v. Malony (1874), 1 W. N. C. Pa. 84; Kreille v. Pearson (1885), 1 C. C. Pa. 52.

⁷⁶Hockey v. Evans (1887), 18 Q. B. D. 390.

⁷⁷Mason v. Redshaw (1834), 2 Dowl. 595.

⁷⁸O'Brien v. Sage (1898), 14 Canada L. T. 70.

An execution creditor, on a sheriff's application, need not support his claim with an affidavit, because it is founded on the judgment and execution.⁸⁰ It has been suggested, that when the goods are seized, while in the possession of the claimant, the application should be supported by an affidavit from the execution creditor,⁸¹ but this suggestion is not followed in practice. An execution creditor is frequently allowed to file an affidavit as to collateral matters, thus, he may show that the execution debtor was clearly in possession when the sheriff seized, with the object of having the claimant made plaintiff in the issue, or that the claimant is out of the jurisdiction and should give security, or, if he disputes the sheriff's right to interpleader, he may show facts which justify such a contention. When a contest is between two execution creditors, the second disputing the priority of the first, it is necessary for the second to support his contention that the prior judgment is collusive, and for that purpose he may examine the judgment debtor, because it is not likely that the debtor will willingly make an affidavit for the purpose.⁸²

A claimant's affidavit should be sworn by himself, but this is not necessary, if it is not practicable, when it may be made by any one having knowledge of the facts.⁸³ An affidavit, made by the solicitor of a claimant who resided abroad alleging that from documents in his possession he believed the claimant was entitled to the property, was held sufficient.⁸⁴ A claimant has been allowed to substantiate his claim by filing an affidavit made by the judgment debtor, in a sheriff's case;⁸⁵ but where it appeared that there was no good reason why an affidavit should not have

⁸⁰ *Angus v. Wootton* (1838), 3 M. & W. 310.

⁸¹ *Duncan v. Tees* (1885), 11 Ont. Pr. 67.

⁸² *Carscaden v. Zimmerman* (1893), 9 Man. 178; *Phillips v. Armstrong* (1892), 12 C. J. T. 179; 8 Man. 48.

⁸³ *Buechley v. Walker* (1880), 1 Leg. Rec. Pa. 329.

⁸⁴ *Webster v. Delafield* (1849), 7 C. B. 187, 18 L. J. C. P. 187, 6 D. & L. 597, 13 Jur. 635.

⁸⁵ *Plues v. Capel* (1880), 68 L. T. Jour. 354.

been made by the claimant himself, he was ordered to file his own, or in default to be barred.⁸⁵

If a claimant's affidavit be lost, he may be allowed an opportunity to file others.⁸⁶

In Pennsylvania it is not an abuse of discretion to refuse an issue, where property has been levied upon, when the claimant files an affidavit setting forth, 'that the goods appearing in the schedule are his under bill of sale and this he can verify at the trial,' but not saying when the bill of sale was delivered, whether before or after the issuing of the execution, nor whether possession was ever given.⁸⁷

Summary disposition.—The matter may be disposed of summarily upon the merits in three cases under the English practice: (1) where both claimants consent, (2) on the request of any claimant, if having regard to the value of the subject matter, it seems desirable so to do, and (3) where the question is a question of law and the facts are not in dispute.⁸⁸ If the court is of opinion that there is really no substantial dispute, it does not order an issue, but makes an order at once declaring to whom the goods belong.⁸⁹

By consent.—The order on a summary decision, if made by consent, should state the consent on its face, otherwise it may be bad as an order, though it may be supported as an award.⁹⁰ It cannot be made without the consent of all the claimants;⁹¹ and if made without such consent, the order will be set aside and an issue directed.⁹²

When subject matter small in value.—In England, the practice in chambers, is not to try the matter summarily, when the value of the subject matter is over £50. This is

⁸⁵ *O'Brien v. Sage* (1898), 14 Canada L. T. 73.

⁸⁶ *Wilson v. Bull* (1857), 3 Upper Canada L. J. O. S. 202.

⁸⁷ *Berger v. Juergen* (1898), 7 Pa. Sup. St. 388.

⁸⁸ Eng. Order LVII., rr. 8 & 9; Ont. Rules, 1110, 1111.

⁸⁹ *Discount Banking Co. v. Lambard* (1893), 2 Q. B. 329; 63 L. J. Q. B. p. 23.

⁹⁰ *Harrison v. Wright* (1845), 13 M. & W. 816.

⁹¹ *Curlewis v. Pocock* (1836), 5 Dowl. 381; *Deehan v. Lynch* (1850), 2 Ir. Jur. O. S. 15.

⁹² *Coulson v. Spiers* (1883), 9 Ont. Pr. 491.

not looked on as a rigid rule of law, but as a rule of practice, not to be lightly departed from, except in an exceptional case. Thus, where a claimant could not give security, and could not pay the value of the property, £70, into court, and it was not deemed advisable to sell, it was ordered that the matter should be tried summarily in chambers.⁹³ The matter in a proper case will be thus tried, although one claimant objects.⁹⁴ The object of the practice is to save expense, which a small property is not able to bear.⁹⁵

Under the same rule it has been decided in Australia, that there is no definite limit of amount on which the jurisdiction of the judge depends. It is a matter for the exercise of his discretion, with which the court will not interfere, unless it is shown clearly that the judge was mistaken or misled. The jurisdiction is to be exercised whenever from the smallness of the amount in question it appears to the judge right, that the merits should be so determined; no limit of amount is fixed by the rule, nor does it appear that the judge is to fix a limit for himself, nor has the legislature said that different judges are to adopt the same limit. Smallness of amount is relative, it will be affected amongst other things by the probable cost of determining the matter in any other way. On the other hand, a small sum may be involved, and the matter be too complicated for the judge to determine summarily.⁹⁶

Where a question of law.—Where the question is one of law, and the facts are not in dispute; as where a claimant by his own showing, has no right, there can be no object in directing an issue and the claimant will be barred.⁹⁷

Where goods seized by a sheriff, were claimed by a brother of the debtor, the brother having acquired title through the debtor's assignee for creditors, and the execution creditor contending that the claimant's professed

⁹³ *Victor v. Cropper* (1886), 3 T. L. R. 110; see also *Topham v. Greenside* (1888), 37 Chy. D. p. 294.

⁹⁴ *Bryant v. Reading* (1886), 17 Q. B. D. 128.

⁹⁵ *Dodds v. Shepherd* (1876), 1 Ex. D. 75.

⁹⁶ *Carter v. Sternberg* (1884), 10 Vict. L. R. (L.) 33.

⁹⁷ *McKay v. Grant* (1894), 14 Canada L. T. 23; see also *Davies v. Smith* (1885), 10 Ont. Pr. 627.

ownership was a sham and a fraud, contrived to enable the debtor to carry on business independently of the demands of his creditors, it was held that the question presented was one of fact, and not one of law which could be tried summarily.⁸⁸

It has been held in England that the power to decide summarily without consent questions in interpleader is not 'a rule of law' within the meaning of a section of the Judicature Act, which enacts that the several rules of law enacted and declared by this Act shall be in force and receive effect in all courts in England.⁸⁹

Other cases.—A summary disposition is also made when the order directs a sale of sufficient goods, in a sheriff's case, to satisfy both the claimant and the execution creditor, as well as where the applicant does not make out a case for interpleading, or where either claimant does not appear, or appearing refuses to join in the contest, or does not produce evidence of his claim which can be looked at.¹ Every decision of a judge, in an interpleader matter, where he does not direct an issue, or a special case, is a summary decision.²

A special case.—Where the question is a question of law and the facts are not in dispute, the court may, under the English practice, order that a special case be stated for the opinion of the court.³

An action may be directed.—If the claimants appear on the application, the court may order that any claimant be made a defendant in any action already commenced, in respect of the subject matter in dispute, *in lieu of* or in addition to the applicant.⁴

⁸⁸ *Rondot v. Monetary Times* (1899), 19 Ont. Pr. 23.

⁸⁹ *Speers v. Daggers* (1885), 1 C. & E. 503.

¹ *Galt v. McLean* (1890), 10 Canada L. T. 163.

² *Re Tarn* (1893), 2 Chy. 280.

³ Eng. Order LVII., r. 9; Ont. Rule 1111; *Trust & Loan v. Lawraon* (1890), 45 V. C. Q. B. 176.

⁴ Eng. Order LVII., r. 7; Ont. Rule 1109; *Tanner v. European Bank* (1896), L. R. 1 Ex. 261; *Brown v. Ludham* (1843), 6 M. & G. 172.

In this connection "in lieu of" means "instead of," and not "in the exact position of," and the court cannot impose on a claimant without his consent, a condition limiting his defence to such grounds as could have been raised by the original defendant in the action.⁵

Under the English Interpleader Act of 1831, the court might order one claimant to commence an action against the other, as an adverse claimant in a sheriff's case against the execution creditor;⁶ and where a sheriff after a claim made, went on and sold, he was made a defendant in an action so commenced.⁷

Practice when action continued.—When an action already commenced is directed to proceed, with the claimant substituted as defendant, the plaintiff must file and serve upon the substituted defendant an amended or supplemental statement of claim or complaint, alleging a right to recover as against the new defendant. The new defendant can then present by his defence or answer, proper issues for trial, upon which the court can render judgment.⁸

In Alabama, where the interpleader statute is silent as to what forms of pleading shall be used, or what issues are to be made up after the new defendant is substituted, it has been held to be the duty of a substituted defendant, when he comes in, to propound his claim in writing by setting it forth with such certainty and fulness, with all necessary averments, so that the plaintiff may know in what it consists, and be enabled to plead or answer, as he may be advised.⁹

An issue may be directed.—If the court has any reasonable doubt in the matter, it directs an interpleader issue, the finding upon which will afterwards satisfy it, as to who

⁵ *Gerhard v. Montague* (1889), 61 L. T. 504.

⁶ *Gillhool v. Coogan* (1853), 5 Ir. Jur. O. S. 244; see also *in re Mersey Dock Board* (1863), 11 W. R. 283; 1 & 2 Will. IV., c. 58.

⁷ *Slowman v. Back* (1832), 3 B. & Ad. 103.

⁸ *Wilson v. Lawrence* (1876), 8 Hun. N. Y. 503; Article in 3 Albany Law Journal, p. 492.

⁹ *Coleman v. Chambers* (1900), 29 So. Rep. 58 Ala.

is right. It will not try the merits upon affidavit.¹⁰ A claimant who has sued a stakeholder cannot object to this, and say that he is entitled to have his case tried in the ordinary way, and not in an interpleader issue.¹¹

Contents of order.—The order provides, that the parties proceed to the trial of an issue, in what court it shall be styled, who shall be plaintiff and who defendant, what the question to be tried shall be, who shall prepare the issue, within what time it shall be delivered, within what time it shall be returned, when and where it shall be tried, with or without a jury, who shall have the conduct of it on behalf of any class of claimants in the same interest, and a reservation or direction as to the disposal of costs and other questions.¹²

Feigned issue.—The direction of the English Act of 1831, and of statutes founded on it, was, that the parties proceed to the trial of a *feigned issue*, alleging a pretended wager, and in which, after reciting the facts at considerable length, the issue proceeded, "in consideration that the plaintiff at the request of the defendant had paid to the defendant the sum of £5, the defendant promised the plaintiff to pay him the sum of £10 if the said goods and chattels at the time of the seizure were the goods and chattels of the plaintiff." In England feigned issues were abolished in 1846, but it has been held that this does not render them illegal.¹³ In Ontario the feigned issue simply fell out of use, in sympathy with the English practice.

Simple issue.—The present English rules provide that the court may order that an issue between the claimants be stated and tried, without saying what kind of an issue. In practice it is a simple issue, in which the plaintiff affirms and the defendant denies.¹⁴

¹⁰ *Discount Banking Co. v. Lambard* (1833), 2 Q. B. 329; *Bramidge v. Adshead* (1833), 2 Dowl. 59; *McElroy v. Baer* (1833), 13 Daly N. Y. 442.

¹¹ *Dowson v. McFarlane* (1830), 15 T. L. R. 497.

¹² *Crump v. Day* (1847), 4 O. B. 760.

¹³ 8 & 9 Vict. Imp. c. 109, s. 19; *Luard v. Butcher* (1846), 15 L. J. C. P. 187.

¹⁴ *Eag. Order LVII.*, r. 7; *Ont. Rule 1100.*

Preparation and delivery of issue.—The issue is prepared by the solicitor of the party directed to be plaintiff in it, and should be delivered by him to the solicitor for the defendant within the time limited by the order. This delivery consists simply in serving the issue as any other paper is served. The defendant's solicitor then returns it, within the time limited for that purpose, with such amendments or alterations as he thinks proper. If the plaintiff is not satisfied with the alterations, and both parties cannot agree in settling it, notice of settling in chambers should be given. When an issue is directed, each party has as much to do with the pleading as the other, and each party is equally concerned in drawing a proper issue to be tried. The issue is completed at once, the declaration and plea being embodied in it without any interval of time being allowed to elapse between them.¹⁵

The Pennsylvania statute requires, that the issue in a sheriff's case shall be a concise statement of the claimant's title, and must be signed and sworn to by him, or by some one for him. The defendant in the issue is also required to file an affidavit, that he believes the plaintiff's title is invalid, and if he makes default in this for fifteen days, judgment will go for the claimant.¹⁶ It has been held, that the plaintiff must file a formal statement of his claim, the claim filed with the sheriff is not sufficient.¹⁷

Infant plaintiff.—When an infant claimant is plaintiff in the issue, he cannot deliver the issue until a next friend is appointed, and failing such appointment he may be barred.¹⁸

Plaintiff in the issue.—The court may direct which of the claimants is to be plaintiff and which defendant in the issue.¹⁹ The proper rule to be followed, is to put in the position of plaintiff, the party upon whom the substantial

¹⁵ *Lott v. Melville* (1841), 9 Dowl. 882.

¹⁶ Pa. P. L. No. 80 of 1897.

¹⁷ *Provost v. Algeo* (1899), 22 Pa. Co. Ct. R. 592.

¹⁸ *Grant v. McKay* (1894), 14 Can. L. T. 286; 10 Man. 243.

¹⁹ Eng. Order LVII., r. 7; Ont. Rule 1109.

onus of proof should properly rest;²⁰ although it has been said, that it is often immaterial which party is plaintiff.²¹ The claimant who is made plaintiff has the right to begin.²²

Where a garnishee admitted his liability to the judgment debtor, but suggested that one B. claimed the money under an assignment, upon settling the issue the claimant B. was made plaintiff.²³

Where the proceeds of a life insurance policy were claimed by the widow of the assured, and also by an assignee for value, and it appeared that the assured had first made a declaration in writing on the policy devoting all the benefit to his wife, and had subsequently by writing assumed to limit such benefit to one dollar, and had then made the assignment to the other claimant, it was held that the latter should be plaintiff in the interpleader issue.²⁴

In sheriff's cases, when the property has been seized in the possession of the execution debtor, the adverse claimant as a general rule is made plaintiff in the issue. It lies on the claimant to prove clearly that the goods are his because possession by the debtor is *prima facie* evidence of title in him;²⁵ and the claimant will be made plaintiff although at the time of seizure the debtor was in possession as the claimant's bailee.²⁶

In Pennsylvania the claimant is made plaintiff and all the other parties defendants.²⁷

Where the property is in the possession of the claimant when seized, the onus is on the execution creditor and he

²⁰ *Doran v. Toronto Suspender Co.* (1890), 14 Ont. Pr. 104; *McKay v. Grant* (1894), 14 Canada L. T. 23; see also *Holt v. Kelly* (1849), 1 Ir. Jur. O. S. 118.

²¹ *Bryce v. Kinnee* (1892), 14 Ont. Pr. 509.

²² *Alexander v. Handy* (1848), 11 Ir. L. R. 328.

²³ *McPhillips v. Wolf* (1887), 4 Man. 300, 7 Canada L. T. 216.

²⁴ *Re Hubbell* (1900), 19 Ont. Pr. 240.

²⁵ *Bentley v. Hook* (1834), 4 Tyr. 229; *Yorke v. Smith* (1851), 21 L. J. Q. B. 53; *Curlewis v. Magan* (1861), 7 Jur. N. S. 1187; *Tremont v. Manly* (1869), 60 Pa. St. 384; *Thompson v. Waterman* (1897), 100 Ga. 586.

²⁶ *Ellis v. Cheesboro* (1894), 14 Canada L. T. 292; *contra Dominion v. Kilroy* (1887), 7 Can. L. T. 87.

²⁷ Pa. P. L. No. 80 of 1897.

should be made plaintiff in the issue.²⁸ It makes no difference, that at the time the writ was placed in the sheriff's hands the debtor alone was in possession.²⁹

It has been said, however, that when the claimant claims title by transfer from the execution debtor, the former should, as a general rule, be made plaintiff in the issue, whether the goods be in his possession or in that of the execution debtor at the time of the seizure, because it is generally reasonable that he should be required to prove his title, and that subject to this rule the person out of possession should be plaintiff.³⁰

When the goods are claimed by the debtor's assignee for creditors, the rule seems to be to make the assignee plaintiff in the issue.³¹

It frequently happens, that both the debtor and the claimant are in possession when the sheriff seizes. If the debtor is tenant or owner of the premises, or the goods are such as can only be used by him, the claimant will generally be made plaintiff. On the other hand, if the claimant is tenant or owner, or the goods are such as can be used by him alone, the onus will be on the execution creditor. Thus, when husband and wife live together in the same house, the husband being tenant or owner, and the wife claiming household goods, not being articles for personal use, such as jewellery, clothing, and the like, she must make out her claim and be plaintiff.³² Where a doctor's horse and medical books when seized were claimed by his wife, she was made plaintiff.³³

²⁸ *Hammill v. De Wolf* (1831), 10 Upper Canada C. P. 419; *Davis v. Levey* (1831), 11 Upper Canada C. P. 292; *Duncan v. Tees* (1835), 11 Ont. Pr. 66 & 296; *Freehold Loan v. Bryson* (1891), 27 Upper Canada L. J. 120; *Farley v. Pedlar* (1891), 21 Canadian L. T. 294; see *contra* *Wingfield v. Fowle* (1887), 14 Ont. p. 107.

²⁹ *Union Bank v. Tizzard* (1883), 9 Man. 149; 13 Canada L. T. 324.

³⁰ *Doran v. Toronto Suspender Co.* (1890), 14 Ont. Pr. 104.

³¹ *Parker v. Booth* (1831), 1 M. & S. 156; *Northcote v. Beauchamp* (1831), 1 M. & S. 158; *Bentley v. Hook* (1834), 2 Dowl. 330; 4, Tyr. 220; *Dibb v. Brooke* (1894), 2 Q. B. 338.

³² *Hogoboom v. Grundy* (1894), 16 Ont. Pr. 48; *Bolster v. Walker* (1893), 30 Canada L. J. 140.

³³ *Walker v. Williams* (1890), Galt. C.J. (Ont.), not reported.

In Manitoba, when a husband works the wife's farm, and crops, or stock, are seized under an execution against the husband, and the wife claims, she will be made plaintiff.³⁴

In Ontario the rule is the other way, and when the claimant is the wife of the execution debtor, and the goods are seized upon the premises in which a business is carried on by her, in which she is assisted by her husband, but in which he has no interest, the execution creditor will be made plaintiff.³⁵

Sometimes the goods, when seized, are neither in the possession of the debtor nor the claimant. Where goods were deposited with a trust company by the claimant, and the sheriff interpleaded upon an intention to seize, the execution creditor was made plaintiff.³⁶

Where an issue was between two execution creditors, the first creditor who had had his writ in the sheriff's hands for a long time, but had not pressed it, was made plaintiff.³⁷

The court may order that any claimant be made a defendant in any action already commenced, in lieu of or in addition to the applicant;³⁸ and if two actions have been commenced, the plaintiff in the second will be made defendant in that which was commenced first.³⁹

Object of the issue.—Interpleader issues are directed to inform the conscience of the court, and unless they are framed with a view of meeting the real questions likely to arise, they are of little practical benefit.⁴⁰ The object being to inform the court which of the parties is entitled to the property in question, or whether each is entitled to a part.⁴¹ It is immaterial in a sheriff's case, whether the issue refers to the goods seized, or the goods seized or any part thereof.

³⁴ *Ady v. Harris* (1893), 9 Man. p. 134; *Strierner v. Merchants Bank* (1894), 9 Man. 546; *Dool v. Conboy* (1893), 9 Man. 185; *Slingerland v. Massey* (1894), 10 Man. 21; *Rae v. Garbutt* (1894), 14 Canada L. T. 187; *O'Neill v. Farr* (1895), 15 Canada L. T. 345.

³⁵ *Farley v. Pedlar* (1901), 1 Ont. 570.

³⁶ *Schuer v. Gordon* (1893), Ont., *Rose, J.*, not reported.

³⁷ *Hasley v. McArthur* (1897), 11 Man. 602.

³⁸ *Eng. Order LVII*, r. 7; *Ont. Rule 1109*.

³⁹ *Sickles v. Willmerding* (1891), 59 Hun. N. Y. 375.

⁴⁰ *Bryce v. Kinnee* (1892), 14 Ont. Pr. 500.

⁴¹ *Price v. Plummer* (1878), 26 W. R. 682; 39 L. T. 37, 657.

Under the former words the claimant may prove ownership to part of the goods.⁴²

Form of the issue.—The form of issue in a stakeholder's interpleader is usually a simple issue, as, whether the plaintiff or the defendant is entitled to the subject matter, or whether the plaintiff is entitled to the goods as against the defendant.⁴³

In a sheriff's case, where the property has been seized in the possession of the execution debtor, the issue is, "as to whether it was the property of the claimant at the time of the seizure as against the execution creditor." The onus is on the claimant. Where money realized by a sheriff was claimed by a receiver the issue was, whether the money in the hands of the sheriff was the property of the claimant as against the execution creditor.⁴⁴

Where goods have been seized in the possession of the claimant, the usual form is, "whether at the time of the seizure the goods in question were exigible under the execution creditor's execution as against the claimant." There should be no doubt from the issue, that the onus is upon the creditor, to show his right to have the seizure made.⁴⁵

The proper form of issue between a claimant and an attaching creditor, is, whether the goods taken under the attachment were, at the time of the seizure, the property of the claimant as against the attaching creditor, and not as against the absconding debtor. It must be assumed that the attaching plaintiff is a creditor in fact.⁴⁶ Where a contest was between an execution creditor and an attaching creditor, an issue was directed as to whether the judgment creditor's judgment and execution were fraudulent and void as against the plaintiff and his attachment.⁴⁷

⁴² *Stephens v. McArthur* (1880), 9 Canada L. T. 230; 6 Man. 111.

⁴³ See *Ross v. Edwards* (1894), 14 Ont. Pr. p. 520.

⁴⁴ *Dibb v. Brooke* (1894), 2 Q. B. p. 358; *Alexander v. Handy* (1848), 11 Ir. L. R. 328; *Larkin v. Graham* (1883), 2 New South Wales L. R. 65; *Schollinberger v. Fisher* (1880), 1 Leg. Rec. P'n. 353; *Keeler v. Hanlewood* (1884), 1 Man. 31.

⁴⁵ *Duncan v. Tees* (1885), 11 Ont. Pr. 66 & 290.

⁴⁶ *Doyle v. Lasher* (1806), 16 Upper Canada C. P. 263.

⁴⁷ *Hall v. Kiasock* (1853), 11 Upper Canada Q. B. 9.

Where it is intended that only the debtor's special interest in the goods shall be sold by the sheriff under an execution, and not the goods themselves, the issue must be framed to meet such a case, namely, the right of the claimant as against a sale of the interest of the debtor.⁴⁰

When a sheriff interpleads upon a landlord claiming, and one question is, whether the sheriff abandoned the seizure, the issue should not then be, 'whether at the time of the seizure by the sheriff, the goods seized were the property of the claimant as against the execution creditor,' but should be, 'Whether there was a seizure by the sheriff at all, and if so whether it was abandoned, and if there was a seizure continuing in force down to the time of the application, whether the rent due at the time of the seizure had been paid in full.' In such a case, the landlord claiming, does not raise any question as to the ownership of the goods. All he claims is his right to be paid under the Statute of Anne.⁴¹

Where a receiver interpleaded, the issue was, whether the claimant, a liquidator, or the creditors who had obtained the receiving order, were entitled to the amount of a balance which had come to the hands of the receiver.⁴²

Other questions than a mere issue.—Other questions, than the trial of a bare issue may be directed, such as the validity of an execution creditor's judgment against creditors generally, and that it shall be open to an attaching creditor to show that the plaintiff's judgment is void through fraud, or as being a preference.⁴³ One party to the issue may be ordered to make certain admissions at the trial, in order that the real dispute between the parties may be settled, and that the rightful claimant may not be defeated the absence of some link in the chain of formal proof.⁴⁴ As an issue is directed to ascertain facts, with a view to ulterior proceedings, it has been said that there is no reason

⁴⁰ *Muckleston v. Smith* (1867), 17 Upper Canada C. P. 40.

⁴¹ *Flynn v. Cooney* (1899), 18 Ont. Pr. 321.

⁴² *Levasseur v. Mason* (1891), 2 Q. B. 73.

⁴³ *Leech v. Williamson* (1884), 10 Ont. Pr. 226.

⁴⁴ *Pooley v. Goodwin* (1885), 5 N. & M. 466; 1 H. & W. 567.

why the court may not for such purpose vary the legal positions and rights of the parties, by directing that a partnership, or bankruptcy, shall not be set up, or that a witness wholly incompetent in point of law shall be examined upon the trial.⁵³

It is not proper to allow a claimant to add to the issue a claim against the execution creditor for damages for trespass.⁵⁴

Time from which title must be shown.—In stakeholder's interpleader, the plaintiff in the issue must generally show that the property was his at the time he made his claim.

In framing the issue upon a sheriff's application, the general rule is, to make the party upon whom the onus is placed, show that he was entitled to the goods at the time of the seizure, not at the time of the delivery of the writ to the sheriff. The substantial fact to be tried must always be, whether the sheriff rightfully interfered with the property, in other words, can the claimant show, that when seized, the goods were his as against the execution creditor.⁵⁵

In England from 1856 to 1894 the goods of an execution debtor, as against a purchaser for value without notice were bound from the time of the seizure by the sheriff, but prior to and since this period, are bound from the time the writ is placed in the sheriff's hands.⁵⁶ In Ontario they are bound from the time of the delivery of the writ to the sheriff to be executed,⁵⁷ and the law seems to be the same in Pennsylvania.⁵⁸ It has been held in New South Wales, that the lodging of the writ of *fi. fa.* with the sheriff is a judicial act and binds the goods from the earliest possible hour of the day.⁵⁹

⁵³ Woodford v. Bosanquet (1848), 5 Q. B. p. 321; D. & M. 419.

⁵⁴ Oliver v. Lewis (1889), W. N. 224.

⁵⁵ Van Every v. Ross (1861), 11 Upper Canada C. P. 133; Keeler v. Haslewood (1884), 1 Man. 31.

⁵⁶ 19 & 20 Vict. Imp. c. 97, s. 1; 56 & 57 Vict. Imp. c. 71, s. 160.

⁵⁷ See Ont. Rule 859 of 1888 and 29 Charles II., c. 3, s. 16.

⁵⁸ Lafferty v. Cormick (1874), 1 W. N. C. Pa. 267.

⁵⁹ Thompson v. De Liassa (1881), 2 New S. Wales L. R. 165; Lever v. Shepherd (1891), 90 Law Times 339.

It has been pointed out in Ontario, that the form of the issue follows the practice established in England under the statute of 1856, which was not enacted in that Province, and makes the question of title relate to the date of the seizure, and not of the delivery of the writ to the sheriff.⁶⁰ On this issue the question will arise, whether the property was or was not bound from the time of the delivery of the writ.⁶¹

Although the goods of a debtor are bound from the delivery of the writ, yet the property in them is not changed by it, and is still in the debtor, and he may sell them subject to the rights of the execution creditor, to which they will be liable in the hands of a purchaser,⁶² from whom they may be taken by the sheriff.⁶³

In many cases it does not make any difference that the plaintiff has to show title at the time of the seizure, because he will generally have to show that the goods were his at the time the writ was placed in the sheriff's hands, in establishing his claim to them at the time they were seized. In some cases the issue has been as to the ownership at the time of the delivery of the writ;⁶⁴ in others as to ownership at the time of the seizure, and always thus when the property is only bound from the seizure.⁶⁵ In some cases the issue has been, as to whether the goods during the currency of the execution were the property of the claimant as against the execution creditor.⁶⁶

If a claimant can show a valid title to goods, and the title had its origin before the seizure, it would of course be

⁶⁰ *Whiting v. Hovey* (1885), 13 Ont. App. R. p. 14.

⁶¹ *Levy v. Hart* (1868), 7 N. S. Wales S. C. R. 142.

⁶² *Samuel v. Duke* (1838), 3 M. & W. 622.

⁶³ *Patterson v. M'Kellar* (1884), 4 Ont. R. 407; *Roach v. McLachlan* (1892), 19 Ont. App. 496; *Breithaupt v. Marr* (1893), 20 Ont. App. 689.

⁶⁴ *Ovens v. Bull* (1876), 1 Ont. App. 62; *Feehan v. Bank of Toronto* (1860), 10 Upper Canada C. P. 32.

⁶⁵ *Vindin v. Wallis* (1864), 24 Upper Canada Q. B. 9; *McMaster v. Milne* (1858), 2 Ont. P. R. 386; *McDowell v. McDowell* (1864), 10 Upper Canada L. J. O. S. 48, 1 Ont. Chy. Chamb. 19.

⁶⁶ *Holden v. Langley* (1862), 11 Upper Canada C. P. 407; *Paterson v. Langley* (1862), 11 Upper Canada C. P. 411.

fatal to his interests to have the issue, as of the time of delivery.⁶⁷

If plaintiff fail to deliver issue.—If the plaintiff in the issue fail to deliver it within a reasonable time, when no time is mentioned in the order, a new order may be obtained, or the original one amended, limiting the time for its delivery; and if this is not complied with, a further order may be made barring the claim, and directing that the subject matter be delivered to the defendant in the issue.⁶⁸

Issue sent to inferior court.—In England, when the amount or value of the matter in dispute does not exceed five hundred pounds, the High Court may order that any interpleader proceeding pending, or to be commenced, may be transferred to a county court.⁶⁹ Under this provision the entire interpleader proceeding must be sent, and not merely the issue for trial.⁷⁰

In Ontario, upon a sheriff's application, where the amount claimed under the execution does not exceed \$400, exclusive of interest and sheriff's costs, or where, in the opinion of the court, the goods are not worth more than \$400 in value, the High Court may order that the issue shall be drawn up and tried in the County Court of the county where the goods were seized, or in any other county if it shall appear more convenient, and all subsequent proceedings up to and inclusive of judgment and execution shall be had and taken in the County Court.⁷¹ And where the amount of the execution, or the value of the goods, does not exceed \$100, the issue may be directed to be tried in the Division Court, and thereafter all proceedings must be carried on in that court.⁷²

⁶⁷ *Van Every v. Ross* (1861), 11 Upper Canada C. P. 133; *McMaster v. Milne* (1858), 2 Ont. P. R. 386.

⁶⁸ *Stanley v. Perry* (1836), 1 H. & W. 669; *Shiels v. Davis* (1850), 6 Upper Canada Q. B. 628.

⁶⁹ 47 & 48 Vict. c. 61, s. 17.

⁷⁰ *Vizard v. Gill* (1893), 95 L. T. Jo. 255.

⁷¹ Ont. Rule 1125 (1).

⁷² Ont. Rule 1126.

These provisions apply only to sheriff's cases, and under them stakeholder's interpleaders, cannot be transferred to the County or Division Court.⁷² It has been suggested, however, that under old chancery powers, preserved in part by the Ontario Judicature Act, issues in stakeholders' cases may be sent by the High Court to the County Court for trial;⁷⁴ but the order must be made by the court, and not by a judge or the master;⁷⁵ and in the absence of any express direction, the issue may be tried before a judge without a jury in the County Court.⁷⁶

It has been held in Ontario, that the Master in Chambers has no jurisdiction upon the application of a defendant in a county court action, to make an order that the county court action proceed with the claimant substituted for the defendant.⁷⁷

When interpleader proceedings under the English Act are transferred, by an order in the ordinary form, to the County Court, the sheriff is not a party to the issue and the County Court Judge has no jurisdiction to order him to pay costs.⁷⁸

When the parties ask that an issue, by consent, be tried by a County Court Judge who has no jurisdiction to hear it, he may refuse to try it, although it may be under the order of a Superior Court.⁷⁹

It has been decided in Manitoba, that an issue involving the title to land may be sent for trial to a County Court, notwithstanding that in matters originating in the County Court there is no jurisdiction to try such titles, as where rent was claimed from a tenant by parties disputing each other's titles.⁸⁰

⁷² *Clancy v. Young* (1893), 15 Ont. Pr. 248.

⁷³ *Clancy v. Young* (1893), 15 Ont. Pr. p. 251; *Teskey v. Neil* (1893), 15 Ont. Pr. p. 247.

⁷⁴ *Thur'ow v. Beck* (1882), 9 Ont. Pr. 208.

⁷⁵ *Wilson v. Wilson* (1878), 3 Ont. App. 400.

⁷⁶ *Re Dolan v. Hooper* (1894), Ont. Robertson, J., in Chambers, not reported.

⁷⁷ *Temple v. Temple* (1894), 10 R. 251; 63 L. J. Q. B. 536.

⁷⁸ *Corcoran v. National Bank* (1892), 26 Ir. L. T. & Sol. J. 379.

⁷⁹ *Hough v. Doll* (1895), 10 Man. 679.

Issue suggested by court.—In a Canadian case, where a foreigner was arrested and his money taken possession of by the constable, upon being discharged, he sued the constable. Insolvency proceedings were also instituted in respect of the foreigner, and the assignee sought to intervene as plaintiff in the suit for the money. This was refused, the court suggesting that the assignee sue the constable, so that the latter might apply under the Interpleader Act, and have the question determined upon an issue.⁸¹

More than one issue may be necessary.—It sometimes happens, when there are more than two claimants, that the direction of a single issue may not conveniently determine who is entitled to the subject matter in dispute. This is most likely to occur in sheriff's cases. Thus where three claimants each claimed different portions of the goods seized, upon the sheriff interpleading, three separate issues were directed.⁸²

In Ontario, the present practice is to direct as many issues as may be necessary to fully determine the rights of all the claimants, the issues to be tried together, or one to be tried first, and others to follow, as may appear necessary in working out the matter.⁸³ One of the rules in the Ontario Judicature Act requires that in every matter pending before it, the court shall have power to grant all remedies any of the parties may appear entitled to in respect of every claim properly brought forward, so that as far as possible all matters in controversy between the parties may be completely and finally determined and multiplicity of proceedings avoided.⁸⁴

In an earlier Ontario decision, which may now be considered as partly superseded, it was said, that if the execution creditor's claim is removed there is no further reason for the suit. The different claimants may then settle

⁸¹ *Mellon v. Nicholls* (1868), 27 Upper Canada Q. B. 167.

⁸² *Argell v. Baddeley* (1877), L. R. 3 Ex. D. 49.

⁸³ *Schuer v. Gordon* (1893), Ont., Rose, J., in Chambers, not reported; *Canadian Bank of Commerce v. Daniels* (1893), Ont., Boyd, C., in Chambers, not reported.

⁸⁴ R. S. Ont. 1897, c. 51, s. 57 (12).

their rights as they may be advised among themselves, the purpose of the issue being answered by its being settled that the execution creditor is not to have his execution satisfied out of the goods seized by the sheriff. In this case there were two execution creditors and three other claimants, and all five claimed the goods, the execution creditors disputing each other's priority. It was held proper to direct two issues only. In the first, one execution creditor to be plaintiff and the three claimants defendants, and the second between the two execution creditors as to the priority of their writs. It was held that a claimant against an execution creditor could not be joined with him, in an issue against another claimant, and that where there is one execution creditor and several claimants the proper order is to make the creditor plaintiff and all the claimants defendants.⁸⁵

Jury.—The general practice is to provide in the interpleader order in the first instance, whether the issue or action is to be tried with or without a jury. It would seem, that if nothing is said about a jury in the order, the issue will be tried by a judge alone, unless a jury notice is served, although formerly all issues were tried by a jury.⁸⁶

In Pennsylvania the following are usually considered questions for a jury in interpleader matters: Change of possession,⁸⁷ delivery of possession,⁸⁸ whether negotiations have been consummated,⁸⁹ whether building material has been sold to the owner or his contractor,⁹⁰ when a wife claims as her separate property and the title depends on the question whether the husband has neglected to provide for his wife,⁹¹ and generally when there is a conflict of tes-

⁸⁵ *Merchants Bank v. Herson* (1883), 10 Ont. Pr. 117.

⁸⁶ See *Hamlyn v. Betteley* (1880), 6 Q. B. D. 63; *Levasseur v. Mason* (1891), 2 Q. B. 73; *Leeson v. Lemon* (1881), 9 Ont. Pr. 103; *Maginnis v. Schwab* (1873), 24 Ohio St. 342.

⁸⁷ *Renninger v. Spatz* (1880), 128 Pa. St. 524; *Manderville v. Dodge*, 7 Kulp Pa. 18.

⁸⁸ *Goddard v. Well* (1895), 165 Pa. St. 419.

⁸⁹ *Heere v. Penn Natural Bank* (1894), 160 Pa. St. 314.

⁹⁰ *Keiser v. Esterly* (1894), 160 Pa. St. 100.

⁹¹ *Bernhart v. Mitchell* (1887), 7 Atla. Repr. Pa. 283.

timony as to ownership,⁶⁶ or when an arrangement has been by parol.⁶⁷

Applicant's position when order made.—As soon as an interpleader order is made directing an action or an issue between the claimants, all questions as to the applicant's right to relief are concluded by the order;⁶⁸ the stakeholder has no longer any interest in the proceedings to follow, and cannot be heard in them or be affected by the final decree; his duty as a stakeholder is at an end;⁶⁹ and if the applicant die the claimants may proceed without reviving the cause.⁷⁰ When the claimants are entering on the final trial of their case, it is not competent for one of them to vary the pleadings by amendment so as to raise questions with the complainant touching the amount of the fund, waste, etc.;⁷¹ nor can they call upon the stakeholder to pay over other moneys as to which he did not interplead.⁷²

In the United States, although the parties to an interpleader suit live in different States, the cause will not before the complainant is dismissed be removed into a United States court, because the complainant is not a nominal party. He has no right in the subject matter, but there is something to be settled between him and the defendants before the latter can litigate together.⁷³

Where issue filed and tried.—An issue, as soon as settled, is filed, and thereupon the parties get ready for trial, as in an ordinary action. An Ontario rule provides that the issue when settled shall be filed in the county in which it is directed to be tried, and thereafter the proceedings are carried on in such county, in the same manner as the proceedings in an action commenced in such county, but the

⁶⁶ *Houghton v. Moyer*, 7 Kulp. Pa. 68.

⁶⁷ *Stoddart v. Price* (1891), 143 Pa. St. 537.

⁶⁸ *Phillips v. Reagan* (1874), 75 Pa. St. 381.

⁶⁹ *Temple v. Temple* (1894), 10 R. 269; *Smith v. Emigrant Industrial Savings Bank* (1888), 17 N. Y. St. Rep. 852; *Balchen v. Crawford* (1844), Sandf. Ch. 380 N. Y.; *Andrews v. Halliday* (1879), 63 Ga. 263; *Owings v. Rhodes* (1886), 65 Md. 408.

⁷⁰ *Anon* (1685), 1 Vern. 351.

⁷¹ *Andrews v. Halliday* (1879), 63 Ga. 263.

⁷² *East Indian Co. v. Campion* (1837), 11 Bligh. N. S. 158.

⁷³ *Leonard v. Jamison* (1833), 2 F.dw. Ch. N. Y. 136.

place of trial may be changed to another county.¹ Before this rule was enacted, when no locality was pointed out by the order, the proceedings were taken in the principal office at Toronto.²

The issue should ordinarily be tried in the county where the goods are seized, in sheriff's cases, but where the sheriff is to remain in possession of the goods of a going concern, a speedy trial is so important, that for the purpose of securing it, the issue may be sent to another county, having regard to considerations of expense and convenience.³

Notice of trial.—It has been held in Ontario, that notice of trial of an interpleader issue must be given as in other cases, although the order directs it to be tried at a particular assize, because it is reasonable and convenient that notice be given, in order that the defendant may prepare for trial.⁴ In Manitoba it has been said that if notice of trial be given by a defendant in an issue, it will be set aside as irregular, if the plaintiff fail to proceed the defendant should move to bar him.⁵

The plaintiff in an issue is bound to proceed to trial without delay, although no precise time has been specified in the order. When a claimant comes in to stop an execution, he must not be guilty of unnecessary delay.⁶

Where a claimant did not go to trial, and the execution creditor applied for payment out of court, an order was made that the claimant go down at the next assizes, that the costs of the day should be paid forthwith by the claimant, while the costs of the motion were directed to stand.⁷

Issue directed to stand.—Where the question in dispute on an interpleader issue, may be decided in a pending action to which all interested persons are parties, the trial of the

¹ Ont. Rule 377.

² *Dominion v. Kilroy* (1887), 12 Ont. Pr. 19.

³ *Farley v. Pedlar* (1901), 1 Ont. 570.

⁴ *Wilson v. Dewar* (1866), 4 Ont. Pr. 13; *Leeson v. Lemon* (1881), 9 Ont. Pr. 103.

⁵ *Plaxton v. Monkman* (1884), 1 Man. 371; see also *Douglas v. Burnham* (1888), 5 Man. 261.

⁶ *Conlan v. —* (1848), 12 Ir. L. R. 75.

⁷ *Kimberley v. Hickman* (1846), 1 Saunders & Cole, 90.

issue will be directed to stand pending the trial of the action.⁹

In Georgia, where one claimant filed a bill against the stakeholder, and the other sought by injunction to restrain him from paying the fund over, the court directed the fund to be paid into court, and that the stakeholder should be discharged from all liability. On appeal the court refused to disturb the order, remarking at the same time that it would have been more regular, if the holder of the fund had filed a bill of interpleader.¹⁰

Discovery and inspection. — The English interpleader rules provide that the ordinary rules with regard to discovery and inspection in actions shall with the necessary modifications apply to interpleader issues.¹¹ In Ontario, the rules which provide for examination and discovery, now apply to issues as well as to actions.¹² In Pennsylvania the same practice prevails.¹³ Where one of the defendants in an interpleading suit moves for a commission to take the evidence of a witness, it should be upon notice to both the plaintiff and the other defendant.¹⁴

The rule which allows one party to obtain discovery from the other, applies equally between the defendants to a bill of interpleader. The only real contest is between them, and one defendant can be looked upon as the "opposite party" by the other.¹⁵

In an action of interpleader, where the defendants were rival claimants to a tin box and its contents deposited in the vaults of the plaintiff's, a safe deposit company, an order

⁹ *Brown v. Nelson* (1884), 10 Ont. Pr. 42.

¹⁰ *Simmons v. Mansfield* (1864), 33 Ga. Supp. 9.

¹¹ Eng. Order LVII., r. 13. For decision before the rules see *White v. Watts* (1862), 31 L. J. C. P. 381; 12 C. B. N. S. 267; *In re Mersey Dock Board* (1863), 11 W. R. 283.

¹² Ont. Rules 439, 464. For decisions before the rules see *Canada Permanent v. Forest* (1874), 6 Ont. Pr. 254; *Dominion v. Kilroy* (1887), 12 Ont. Pr. 19.

¹³ *Kibbee v. McKinley*, 47 L. I. Pa. 4.

¹⁴ *Brymer v. Buchanan* (1788), 1 Cox 425; see Alabama Code in Appendix.

¹⁵ *Perkins v. Morgan* (1890), 33 S. E. 705 (Ga.).

for the inspection of the books, papers and contents of the box, with permission to make copies was held proper.¹⁵

Particulars.—Upon an issue directed on a sheriff's interpleader, the execution creditor, defendant in the issue, is entitled to an order directing the claimant to specify the goods claimed by him, because if the goods not claimed should be of sufficient value to satisfy the execution creditor's debt, the issue would be a useless expense.¹⁶

Non-suit.—A plaintiff may be non-suited on the trial of an issue under the Interpleader Act.¹⁷

Issue cannot be amended.—On the trial of an interpleader issue, the issue as directed by the interpleader order cannot be amended at the trial;¹⁸ if either party is not satisfied with the form of it, and desires to have it amended, he must move in the original proceedings.¹⁹

Scope of issue limited.—When an issue is directed to determine whether certain goods are the property of one claimant or the other, it is a statutory proceeding for that purpose alone, and cannot be made to cover other matters; thus where an interpleader was directed to determine conflicting claims to property distrained for rent, between the landlord distraining and a third party claiming the property or its proceeds, it was held that there could not be rendered in such proceeding a judgment for money, for the value of the property, in favour of the landlord against the adverse claimant, although the latter had received the property or its proceeds.²⁰

Matters reserved until after trial.—The practice upon a bill of interpleader, when an issue is directed, is to provide in the decree or order that all costs and other matters not disposed of shall be reserved until after the trial of the issue. The effect of this is, that the parties are required

¹⁵ *Mercantile Safe Deposit Co. v. Hassey* (1896), 1 N. Y. Law Rec. 59.

¹⁶ *Price v. Plummer* (1878), 26 W. R. 682.

¹⁷ *Bryson v. Clandinan* (1850), 7 Upper Canada Q. B. 198.

¹⁸ *Grant v. Hill* (1863), 5 Phila. Pa. 173.

¹⁹ *Shingler v. Holt* (1861), 30 L. J. Ex. 321; 7 H. & N. 65; *Price v. Plummer* (1878), 26 W. R. 682.

²⁰ *Bartlett v. Loundes* (1890), 34 W. Va. 493.

to go back to the tribunal directing the issue for further directions, and a final order after the trial is over.²¹

Formerly this was also the uniform practice under the English Interpleader Act. After the trial of the issue, the matter went back to the judge at chambers, subject to this, that he was then obliged to accept the findings upon the issue as one of the facts in the case, and he would then make his order and settle what was to be done under the circumstances.²² When the interpleader order was made in chambers, it was necessary to go back to chambers for the final order, the court had no jurisdiction under such circumstances. In England it was necessary to go back to the same judge in chambers, but in Ontario, any judge in chambers had jurisdiction.²³

Under a recent English rule, which is also in force in Ontario and other Provinces, the court or judge who tries the issue may finally dispose of the whole matter of the interpleader proceedings, including all costs not otherwise provided for.²⁴ The judge who tries the issue, proceeds and makes an order upon it, in the same way as the judge at chambers formerly did,²⁵ and in making such order he acts as a judge in chambers.²⁶ The rule wisely prescribes that the judge who tries the issue shall be clothed with the power, if he choose, of finally adjusting all the rights of the parties, instead of the judge at chambers. It confers upon the judge sitting to try the issue, all the authority and all the functions of a judge sitting in chambers. The judge trying

²¹ See *Kebel v. Philpot* (1839), 9 Sim. 614.

²² *Discount Banking Co. v. Lambarde* (1893), 2 Q. B. 329; 63 L. J. Q. B. p. 23.

²³ *Burg v. Schofield* (1842), 2 Dowl. N. S. 261; *Marks v. Ridgway* (1847), 1 Ex. 8; *Sewell v. Buffalo* (1856), 3 Upper Canada L. J. O. S. 29; 2 Ont. Pr. 56; *Commercial Bank v. Clark* (1853), 1 Ont. Pr. 276.

²⁴ Eng. Order LVII., r. 13; Ont. Rule 1114.

²⁵ *Discount Banking Co. v. Lambarde* (1893), 2 Q. B. 329; 63 L. J. Q. B. p. 23.

²⁶ *Field v. Rivington* (1889), 5 T. L. R. 642; *Macnair v. Audenshaw* (1891), 2 Q. B. 502; 65 L. T. 292.

the issue, certainly can better adjust the rights with knowledge of all the circumstances, than a judge at chambers, hearing that part of the case afterwards.²⁷

It is to be observed that this rule is not directory, and consequently the old practice is often still followed of allowing the matter to go back to chambers, when it is not convenient for the trial judge to make a final order. It has been held in Ontario that the trial judge must at any rate dispose of the costs of the issue.²⁸

Interlocutory matters.—In addition to the matters to be disposed of after the trial, there are, as in any action, many interlocutory matters which may have to come before the court previous to the trial. These applications are heard in chambers where the original order was made,²⁹ or by the judge of the forum to which the issue is sent for trial.³⁰ Thus it may be necessary to go back to the original tribunal for an order adding a new claimant after an issue has been directed,³¹ or where either party is not satisfied with the form of the issue and desires to have it amended.³² Although the interpleader order directs the issue to be tried at a particular sittings, still, in case of any accident preventing the trial, as upon a jury failing to agree, the judge presiding may adjourn the trial to a subsequent sittings.³³

If a claimant fail to deliver the issue, or neglect to bring it to trial, or abandon his claim, which is the same as if the issue had been found against him, or make any other default, the other claimant may then move in the original

²⁷ Bowen, L.J., *Macnair v. Audenahaw* (1891), 65 L. T. p. 294; 2 Q. B. 502.

²⁸ *Grothe v. Pearce* (1898), 15 Ont. Pr. 432.

²⁹ *Swain v. Stoddart* (1888), 12 Ont. Pr. 490.

³⁰ *Robinson v. Richardson* (1872), 32 Upper Canada Q. B. 344.

³¹ *Bird v. Matthews* (1882), 46 L. T. 512.

³² *Shingler v. Holt* (1861), 30 L. J. Ex. 521, 7 H. & N. 65; *Price v. Plummer* (1878), 26 W. R. 682.

³³ *Robinson v. Richardson* (1872), 32 Upper Canada Q. B. 344; *London v. Morphy* (1885), 11 Ont. Pr. 86; but see *Kebel v. Philpot* (1889), 9 Sim. 614.

proceedings to have the defaulting claimant barred, or to have the interpleader order rescinded as the case may be.³¹

It is not proper for an execution creditor to move to rescind an interpleader order, when the sheriff has improperly handed the goods to the claimant. The claimant's position must be considered, he has been deprived of any action against the sheriff, and has been remitted to proceedings under the interpleader order, and there is no reason why he should be turned to another mode of proceeding in order to establish his right to the property.³²

Where an act of Parliament passed subsequently to the making of an interpleader order, had the effect of rendering the trial of the issue useless, the court discharged the original order.³³

Final matters.—When the trial judge has determined which claimant is entitled to the subject matter, as directed in the issue, among the further questions to be dealt with in chambers by the trial judge or by another judge or a master are: the barring of the unsuccessful party, a direction that the successful claimant shall receive the subject matter, or the fund if money has been paid into court, or his bond for cancellation if he has previously taken the goods upon giving security, that he be paid his costs of the interpleader application of the issue and the final order, and any amount deducted from the proceeds of the subject matter or the fund by the applicant for his costs and charges, and provision for the appellant's costs if they have not already been provided for.

When it is necessary to go back to chambers for the determination of any of these matters, the application should be entitled in the cause in which the interpleader order was

³¹ *Stanley v. Perry* (1830), 1 H. & W. 669; *De Rothschild v. Morrison* (1890), 24 Q. B. D. 750; *Sewell v. Buffalo* (1856), 3 Upper Canada L. J. O. S. 20; *Shiels v. Davis* (1850), 6 Upper Canada Q. B. 628; *Plaxton v. Monkman* (1884), 1 Manitoba 371; *Levy v. Mollison* (1864), 3 N. S. Wales S. C. R. 81.

³² *Howe v. Martin* (1890), 6 Manitoba 615.

³³ *Luckin v. Simpson* (1840), 8 Scott 676.

made, and not in the issue.³⁷ The successful claimant will, upon production of the record, obtain his order as of course.³⁸ Before moving for an order for his costs the successful claimant should first demand payment of them, or he may be refused the costs of his final order.³⁹

The successful party moving must notify the other claimant of his application, but as a general rule there is no occasion for serving notice upon the applicant. It has been held in Ontario, however, that it is proper to notify the sheriff and he is entitled to his costs of attending.⁴⁰

One question to be disposed of, may be the sheriff's costs and expenses.⁴¹ The sheriff should have an opportunity of intimating whether he desires his strict order for costs against the execution creditor.⁴² It would seem, therefore, that an execution creditor should notify the sheriff, while there is not the same necessity for a claimant who succeeds doing so.

Arrangement by consent.—Where the parties agree out of court to vary the terms of an interpleader order, a sheriff is justified in acting according to their agreement, without any subsequent order,⁴³ but he cannot be compelled by the parties to do so.⁴⁴ The claimants being the real parties in interest, it is competent for them without regard to the applicant to make such an adjustment of the controversy as they may think best, and so end the suit.⁴⁵

³⁷ *Levi v. Coyle* (1843), 2 Dowl. N. S. 932; *Elliott v. Sparrow* (1835), 1 H. & W. 370; *Matthews v. Sims* (1830), 5 Dowl. 234; *Sewell v. Buffalo* (1850), 3 Upper Canada L. J. O. S. 29; *Gladstone v. McDonell* (1858), 4 Upper Canada L. J. O. S. 210; *Salter v. McLeod* (1864), 10 Upper Canada L. J. O. S. 299; *Taylor v. Clark* (1855), 1 Ont. Pr. 276; *Commercial v. Clark* (1855), 1 Ont. Pr. 276; *Stewart v. Smith* (1851), 1 Phila. 171.

³⁸ *Macpherson v. Norris* (1857), 3 Upper Canada L. J. O. S. 40.

³⁹ *Bowen v. Bramidge* (1833), 2 Dowl. 213.

⁴⁰ *Gray v. Alexander* (1884), 10 Ont. Pr. 358; but see *contra*, *O'Brien v. Bull* (1883), 9 Ont. Pr. 484.

⁴¹ *Leid v. Murphy* (1887), 12 Ont. Pr. 338.

⁴² *Smith v. Darlow* (1884), 26 Chy. D. 605.

⁴³ *Hackett v. Bible* (1888), 12 Ont. Pr. 482.

⁴⁴ *Discount Banking Co. v. Lambarde* (1893), 2 Q. B. 329; 9 L. R. 611.

⁴⁵ *Horton v. Baptist Church* (1861), 34 Vermont 309.

CHAPTER VIII.

THE INJUNCTION.

Object of the injunction.—The injunction, or stay of proceedings, in interpleader, is always the chief object which a harassed stakeholder or debtor has in view, as it protects him by staying actions or suits which have been actually commenced,¹ and by restraining the institution of threatened or prospective ones. The injunction is almost always of course, if the case be a proper subject for interpleader.²

Terms "injunction," "stay of proceedings."—The cases in which courts interfere, by way of injunction, are usually classed under two heads, (1) injunctions to prevent the inequitable institution or continuance of judicial proceedings, and (2) injunctions to restrain wrongful acts unconnected with judicial proceedings. It is in the first of these classes, that the injunction granted in interpleader suits lies, and it will be found, that the equitable principle and practice of staying and preventing vexatious actions is now embodied in most interpleader codes, or in the procedure under them. When the expression 'stay of proceedings' is used, instead of the term injunction, it is a mere change of name, and not of the nature of the proceeding.

Actions against stakeholder.—As already pointed out, if a stakeholder makes out a case proper for interpleader, the claimants' actual or threatened actions against him, for

¹ *Hilliard v. Hanson* (1882), 21 Chy. Div. 60.

² *Crawshay v. Thornton* (1837), 2 M. & C. p. 19. *Besant v. Wood* (1879), 12 Chy. Div. p. 680.

the subject matter, will be stayed as a matter of course;³ and it does not matter that one claimant does not appear and is barred.⁴

A person obtaining an interpleader order is obliged to obey the directions of the court, and so, when goods are sold by a stakeholder under an interpleader order, it is the act of the court, and a claimant cannot afterwards sue the stakeholder for damages for such conversion.⁵

After a Scotch action of multiplepoinding, a successful claimant was not allowed a judgment for damages against the stakeholder, under the following circumstances:—A bank held debenture stock in a railway for three customers, on the announcement of a new issue two gave instructions that they would take a share, but the third did not at once answer the bank's letter, the stock was over subscribed and the railway issued proportionate amounts; the bank again wrote the third customer who replied that he would take his proportion, and he instructed the bank to sell the stock for him. The other two claimed the whole allotment, and the bank raised an action of multiplepoinding, and in the end the third customer's claim was sustained. He then sued the bank for damages, in not selling when instructed, as the stock afterwards fell. It was held that the bank was justified in what it did, and was not liable.⁶

Rule as to protecting the sheriff.—Sheriffs acting *bona fide* are entitled to, and will always receive, the protection of the Court.⁷ The English Interpleader Act was made in relief of sheriffs, and the consequence is, when a claimant is brought before the court, he is deprived of his action against the sheriff, and is made to join issue with the execution creditor.⁸ The claimant will be barred of any ac-

³ *Crawshaw v. Thornton* (1837), 2 M. & C. 1; *Henderson v. Garrett* (1858), 35 Miss. 554; *Fowler v. Lee* (1839), 10 G. & J. (Md.) 358.

⁴ *M'Elheran v. London* (1886), 11 Ont. Pr. 181.

⁵ *Ross v. Edwards* (1894), Ont. Ct. of Appeal, Osler, J., not reported.

⁶ *Dougall v. National Bank* (1892), Ct. of Session 20 R. 8.

⁷ *Gregory v. Slowman* (1852), 1 E. & B. p. 369.

⁸ *Bellhouse v. Gunn* (1861), 20 Upper Canada Q. B. 550.

tion against the sheriff whether he maintains his claim, or refuses to come into court to establish it.⁹ The sheriff will also be protected although the execution creditor may not appear.¹⁰

In Pennsylvania, the sheriff is freed from all liability to the claimant, the execution creditor, the execution debtor, the person in possession, and all other persons who have knowledge of the seizure.¹¹

If, however, a sheriff enters the premises of a stranger to the writ, and there seizes and takes away goods, as the property of the debtor, he will not, upon interpleading, receive the usual protection, when it appears that a substantial grievance has been done to the person whose premises are thus entered.¹²

It has been held in Iowa, that the statute there in force, which allows a sheriff to interplead, has reference only to actions for the recovery of specific personal property seized by him, and does not allow the substitution of the attachment plaintiff for the sheriff in an action against the latter for trespass committed in executing the writ.¹³

In Pennsylvania the granting of an interpleader issue does not relieve the sheriff from responsibility for a prior trespass in levying on goods in the possession of a stranger, which are subsequently sold on the claimant failing to give security, in such a case the sheriff in order to protect himself should apply for an interpleader before making an actual levy. He will be protected however from all acts done after the order is made.¹⁴

Where it was charged that the sheriff had been guilty of misconduct after the seizure, and the execution creditor not appearing was barred, an order was made that the claimant should be at liberty to commence an action against the

⁹ *Larzelere v. Haubert* (1885), 100 Pa. St. 515.

¹⁰ *McCorn v. Esher, T. & H. Pr. Pa. Sec.* 1139.

¹¹ Pa. P. L. No. 80 of 1897.

¹² *De Coppett v. Barnett* (1901), 21 Times L. R. 273 (C. A.)

¹³ *Sperry v. Ethridge* (1886), 70 Iowa 27.

¹⁴ *Zacharias v. Tolton* (1879), 90 Pa. St. 286.

sheriff to try whether the claimant had sustained any damage, and if so what amount, through the misconduct of the sheriff subsequent to the seizure.¹⁵

When a sheriff, in levying an execution, enters the premises of a person other than the execution debtor, and there seizes goods believing erroneously that such goods belong to the debtor, he may, in interpleader proceedings, be protected against an action for trespass to the lands, as well as against an action for seizure of the goods, provided he has not acted wrongfully and has not exceeded his duty.¹⁶

If an action has already been commenced against the sheriff, it will be stayed upon the interpleader application.¹⁷ It is not proper for a claimant to bring an action against the sheriff before the latter has had time to interplead, if he do so he will be ordered to pay his own costs, the claimant should wait and see the result of the notice which he has given the sheriff;¹⁸ and pending the interpleader an action will not lie against the sheriff.¹⁹

It has been decided in Iowa, that the statutory provisions which allow a sheriff who has been sued to interplead, are unconstitutional in so far as they assume to discharge him from liability, because they deprive the plaintiff of rights which are in the nature of property, without due process of law.²⁰

When, in a sheriff's interpleader order, a clause is inserted that no action shall be brought, the words "no action" mean, no action against the sheriff,²¹ and when the order so provides no action can be brought.²²

¹⁵ *Lewis v. Jones* (1836), 2 M. & W. 203.

¹⁶ *Winter v. Bartholomew* (1856), 25 L. J. Ex. 62; *Smith v. Critchfield* (1885), 14 Q. B. D. 873; see to the contrary *Abbott v. Richards* (1846), 15 M. & W. 194; *Hollier v. Laurie* (1846), 3 C. B. 334; see also chapter VI.

¹⁷ *Booth v. Preston* (1860), 3 Ont. Pr. 90; Eng. Order LVII., r. 6; Ont. Rule 1106.

¹⁸ *Hilliard v. Hanson* (1882), 21 Chy. Div. 69.

¹⁹ *Kleber v. Hamilton* (1878), 26 P. L. J. Pa. 100.

²⁰ *Sunberg v. Babcock* (1883), 61 Iowa 601; *Maish v. Littleton* (1883), 62 Iowa 105.

²¹ *Hooke v. Ind Coope and Co.* (1877), 36 L. T. N. S. 467.

²² *Winter v. Bartholomew* (1856), 25 L. J. Ex. 62; *Smith v. Critchfield* (1885), 14 Q. B. D. 873.

As a general rule the order protecting the sheriff covers an action by the execution creditor, as well as by the claimant. An execution creditor can only sue the sheriff when he has been guilty of some negligence in executing the writ, and sometimes the creditor's right of action against the sheriff for such negligence has been reserved by an interpleader order.²³ It has been said, that in an action against a sheriff for not selling under an execution, he may set up the title of a third person, though the latter does not join issue, under the rule for an interpleader.²⁴

Whether a sheriff has seized under special instructions from the execution creditor or not, if the creditor takes an issue with the claimant, the order gives the sheriff full protection by directing that no actions shall be brought against him for the seizure.²⁵ But, if on the sheriff's application the creditor declines an issue, and disavows the act of the sheriff in seizing, he will be barred from the goods and from bringing an action against the sheriff, but the sheriff will not be protected from actions which the claimant may bring.²⁶

Where a sheriff without special instructions seized under two writs, and a claimant appearing, the sheriff applied for an interpleader, when one creditor took an issue with the claimant while the other disavowed the seizure, an order was made on the first writ directing an issue and protecting the sheriff, and on the second his application was dismissed with protection to the second creditor only. Under these circumstances the claimant sued the sheriff for wrongfully seizing under the second writ, and obtained a verdict.²⁷

Execution stayed until issue determined.—When a sheriff withdraws upon the claimant paying money into court, or giving security, the execution is stayed, and the execution creditor cannot have a return, or issue a second or *alias fi. fa.*

²³ *Brackenbury v. Laurie* (1834), 3 Dowl. 180.

²⁴ *Commonwealth v. Megee* (1861), 4 Phila. Pa. 258.

²⁵ *Bellehouse v. Gunn* (1861), 20 Upper Canada Q. B. 550.

²⁶ *May v. Howland* (1850), 19 Upper Canada Q. B. 66.

²⁷ *Johnson v. Macdonald* (1863), 23 Upper Canada Q. B. 183.

until the issue has been determined. Until such time the sheriff cannot tell whether he should make a return, or proceed to levy on other goods, or if there are no such goods, make a return of *nulla bona*.²⁹

In Scotland it has been held, that the mere existence of an action of multiplepoinding, in which an execution creditor is involved, is no bar to the execution being proceeded with.³⁰ The process does not stop the race of diligence or execution, and it has been said that it would be a strange result if it did, considering that multiplepoinding often depends in the Scotch courts for a great number of years, twenty and thirty and more being known.³⁰

Sheriff's position when relief refused.—If the application of a sheriff be refused, it is always open to the court to give him further time to return the *fi. fa.* or the process, which leaves him to perform the duty cast upon him by law, as best he can, but he will be allowed a reasonable time to make his return after his application is refused.³¹

Time for objecting to relief.—The time for disputing the applicant's right to the protection of the court, is when he first applies for the order to interplead. If a claimant has appeared in court upon the application, it is too late for him afterwards to impugn the applicant's right to relief, when the money has been lodged in court, or after a rule for an interpleader has been made absolute.³²

When protection may be lost.—A person who has obtained an interpleader order, must follow its terms implicitly, or he may lose his protection. Thus, where pending the trial of an issue, a sheriff took an indemnity from

²⁹ *Ex parte Ford* (1886), 18 Q. B. D. 309; *Angell v. Baddeley* (1877), L. R. 3 Ex. Div. 49; *Burns v. Toner* (1872), 9 Phila. Pa. 37; but see an early decision *Cleaver v. Fisher* (1842), 2 Dowl. N. S. 202.

³⁰ *Ferguson v. Bothwell* (1882), Ct. of Session 9 R. 687.

³¹ *Smith v. Grant* (1862), Ct. of Session, 24 D. 1142.

³² *Rex v. Sheriff of Herefordshire* (1836), 5 Dowl. 144; 2 H. & W. 122.

³³ *Alexander v. Handy* (1848), 11 Ir. L. R. 328; *Grant v. Hancock* (1863), 5 Phila. Pa. 198; *San Francisco Savings Union v. Long* (1898), 55 Pac. Rep. 709 Cal.

the execution creditor and selling the goods paid the proceeds to the creditor, the claimant having succeeded obtained an attachment against the sheriff for selling in violation of the interpleader order, obtained at his own instance and for his own protection.²³ If a sheriff improperly withhold goods, after an interpleader issue has been decided in the claimant's favour, he will give a new cause of action against himself.²⁴

Order without jurisdiction.—Officers of the court are not protected, in respect of process executed under an interpleader order made without jurisdiction, though good on its face, if such order has been obtained on their own application.²⁵

Procedure when sheriff disobeys order.—If a sheriff disobeys an interpleader order, the proper way to proceed against him, is by way of motion for a writ of attachment, for on such a proceeding the court can regulate the conduct of its officer. Where a sheriff allowed the landlord to take the goods pending the trial of an interpleader issue, and the latter sold them and had nothing left after satisfying the rent and taxes and expenses of sale, the creditor, having succeeded in the issue, obtained an attachment against the sheriff, because there was no claim for rent which he was justified in acknowledging.²⁶ But where the debtor was adjudicated a bankrupt, after an interpleader order had been made, and upon the messenger entering the sheriff withdrew leaving him in possession, the court refused an attachment against the sheriff, at the suit of the execution creditor for contempt in not proceeding to a sale pursuant to the order.²⁷

If any person complains of the sheriff's conduct under an interpleader order, another course for such person is to move for directions under the interpleader order, to regulate the sheriff, who is acting for the court, and not to

²³ *Henderson v. Wilde* (1849), 5 Upper Canada Q. B. 585.

²⁴ *McCollum v. Kerr* (1862), 8 Upper Canada L. J. O. S. 71.

²⁵ *Speers v. Daggers* (1885), 1 C. & E. 503.

²⁶ *Maclean v. Anthony* (1884), 6 Ont. 330.

²⁷ *Collins v. Cliff* (1863), 8 L. T. N. S. 466.

commence an action. Thus, where, under an interpleader order, a sheriff was to remain in possession of a stock of goods in a store, and to continue the business until the claimant should give security, or pay the amount of the execution into court, the claimant in the meantime to pay the sheriff's possession money weekly, and after being in possession for about a week, the sheriff offered the goods for sale, but they remained unsold for lack of bidders, the claimant, who was also landlord of the premises, then brought an action against the sheriff for rent from the time the goods were offered, and for damages, the action was dismissed, because the claimant should have moved in the interpleader proceedings.³⁹

A sheriff having improperly delivered goods to a claimant, and the execution creditor finding it useless to proceed with the issue, moved to rescind the interpleader order, it was held that relief could be obtained for the action of the sheriff without rescinding the order. The order protects the sheriff in respect of his acts prior to its being made, but not for acts in contravention of its terms, or in breach of duty under it. If a sheriff has improperly committed an act, from which the execution creditor has suffered damage, the latter should have his remedy, but the sheriff ought not on that account, to lose the protection which the order gives him in respect of his prior acts. If the order were rescinded he would be exposed to the risk of actions by the claimant, as well as by the execution creditor.⁴⁰

If order rescinded without notice to sheriff.—Where an interpleader order provided that no action should be brought against the sheriff, and was subsequently rescinded owing to the default of the execution creditor in failing to return the issue, it was held, that the claimant had no cause of action against the sheriff for the original seizure.⁴¹ The sheriff had sold under the order, as he was bound to do, and

³⁹ *Pearce v. Armstrong*, Ont., Rose, J., 21 Dec., 1893, unreported; *Butler v. Lloyd* (1849), 1 Ir. Jur. O. 8, 37.

⁴⁰ *Howe v. Martin* (1890), 6 Man. 615.

⁴¹ *Martin v. Tritton* (1884), 1 C. & E. 226.

if he had not done so, would have rendered himself liable to an attachment.

An interpleader order having been set aside at the instance of an execution creditor, the sheriff delivered the goods to the claimant. The creditor then sued the sheriff, but his action failed because he did not show that the goods belonged to the debtor, and the order having been set aside the sheriff was not bound by it.⁴¹

When sheriff ordered to withdraw.—When, upon a sheriff's application an order is made for him to withdraw he will, if his conduct has been proper, receive his usual protection.⁴²

Personal actions against stakeholder.—The injunction which an interpleader order affords, protects an ordinary stakeholder from all actions which have been, or may be, commenced to recover the property in dispute, but leaves the claimants at liberty to prosecute any personal actions, which they think they can maintain against the person interpleading, for special damages.⁴³

If order contains no protecting clause.—If a person seeking relief is not protected by an interpleader order, directing an issue between the claimants, although obtained at his own instance, he is still liable to an action, even by the unsuccessful claimant, but only as to matters apart from the title of the subject matter, such as damages for breach of contract.⁴⁴ If, after an order without protection, the unsuccessful claimant commence an action for damages for conversion, the stakeholder is not entitled, before appearing, to have the action against him stayed, as being improper and an abuse of the process of the court.⁴⁵

Actions before foreign tribunals.—It has already been pointed out, that a foreigner residing without the jurisdiction may be a claimant in interpleader proceedings, and the

⁴¹ *Dafoe v. Ruttan* (1860), 19 Upper Canada Q. B. 334.

⁴² *Stern v. Tegner* (1898), 1 Q. B. 37.

⁴³ For the law on this subject see Chapter VI.

⁴⁴ *Ross v. Edwards*, Ont. Ct. of App., 13th Nov., 1894, not reported; see also *Aylwin v. Evans* (1882), 52 L. J. Chy. 105.

⁴⁵ *Ross v. Edwards* (1893), 15 Ont. Pr. 150.

decisions show that the courts will sometimes allow service of a summons, petition or notice upon the foreigner abroad, although they will have no authority to enforce any order which may be made, except in so far as it may enjoin the foreigner from afterwards commencing an action within the jurisdiction against the stakeholder.⁴⁶

The case of one claimant suing the stakeholder at home, and a foreign claimant suing him abroad for the same subject matter, is not analogous to the case of the same plaintiff suing in two different countries for the same property.⁴⁷ The home court cannot act against the foreign tribunal, and hence no interpleader can be effectually decreed, because it can not enjoin the foreign action, if an action is proceeding, nor act against the person of the foreign claimant, because he is not within the jurisdiction, to any greater extent than above mentioned.⁴⁸

It has accordingly been held in the United States, that interpleader will not be awarded if the absent claimant is suing in another State, at the time the stakeholder seeks relief. There is no jurisdiction to afford relief by way of interpleader when the court applied to has no power to stay actions commenced by the claimants in other courts.⁴⁹ And payment into the home court will not protect the stakeholder from having to pay over again under a foreign judgment.⁵⁰

Recent view in Ontario.—Another view has been taken in Ontario, and interpleader has been allowed, where one of the claimants was suing in a foreign jurisdiction. The stakeholder was in danger of being sued in Ontario, although the pending action was abroad, because it was said, that it

⁴⁶ *Credits Gerundense v. Van Weede* (1884), 12 Q. B. D. 171; *Re Busfield* (1886), 32 Chy. Div. p. 131; *Eschger v. Morrison* (1890), 6 Times L. R. 145; and see *ante* p. 107 *et seq.*

⁴⁷ See *McHenry v. Lewis* (1882), 22 Chy. Div. 397.

⁴⁸ See *Hyman v. Helm* (1883), 24 Chy. Div. 531; *Schuyler v. Pelissier* (1838), 3 Edw. Chy. N. Y. 191; *Harris v. Bank of B. N. A.* (1900), 19 Ont. Pr. 51.

⁴⁹ *Orient v. Sloan* (1888), 70 Wis. 611; *Walsh v. Rhall*, 6 Kulp. Pl. 483.

⁵⁰ *Barry v. Equitable* (1873), 14 Abb. Pr. N. C. N. Y. N. 385.

was only by subsequent proceedings in Ontario that a judgment obtained elsewhere could probably be enforced. Proceedings at home can reasonably be anticipated, and it is but right that a stakeholder should have an opportunity of preventing them, and so if possible avoid the trouble and expense of defending actions in foreign jurisdictions, by inducing the rival claimants to litigate their claims in one proceeding in the applicant's home courts. It must be borne in mind that foreign claimants cannot be compelled to appear, or be prevented from pursuing any remedy which may be open to them, in the courts abroad. If the stakeholder have property abroad exigible in execution under a judgment in the foreign court, he may find himself in an unfortunate position if he takes an interpleader at home. It may be, however, that the foreign courts will prevent any real injustice from being done in such a case.⁵¹

Other cases.—If both claimants reside in the same jurisdiction, and one of them commences his action in a foreign court, the home court may award an interpleader on the principle that it can then act against the person of the claimant suing abroad, and thus compel him to stay his foreign action, and it would be subject to the rule, so far as applicable, that in double actions by the same plaintiff, it is not vexatious to bring the same action in two countries when there are substantial reasons of benefit to the plaintiff from so doing.⁵²

But, as has been pointed out, interpleader has been awarded in many cases where the claimant is in another State or country and has not instituted an action; and it will be found as a general rule, that a foreigner or absent claimant asserts his claim through some attorney or agent within the jurisdiction, and submits to the jurisdiction, and that the question of his being a foreigner does not arise, until he is directed to give security for costs if such direction is proper.⁵³

⁵¹ *Re Confederation Life Assn.* (1900), 19 Ont. Pr. 16, 89.

⁵² *McHenry v. Lewis* (1882), 22 Chy. Div. 397; *Peruvian Guano Co. v. Bockwoldt* (1883), 23 Chy. Div. 225; *Schuyler v. Pellissier* (1838), 3 Edw. Chy. N. Y. 191.

⁵³ See cases cited under Security for Costs.

When the foreign claimants appear in an interpleader suit, the proceedings must be disposed of according to the law of the State or country in which they are instituted.⁵⁴

Interpleading in two countries.—Where a stakeholder had taken in Scotland proceedings in the nature of interpleader, called there an action of multiplepinding, and before a decision was given one of the claimants sued the stakeholder in England, the English court held, that the stakeholder, a Life Assurance Society, having admitted that they had no interest in the money claimed, must pay it into court without being indemnified by the plaintiffs from having to pay it into court in Scotland, although the practice of the Scotch courts might be to require this to be done, notwithstanding the payment of the same into the English court.⁵⁵

United States Courts.—So, when a stakeholder files a bill of interpleader in a Circuit Court of the United States, that court has no power to restrain or interfere with a suit prosecuted by one of the claimants and pending in a State Court, by enjoining the further prosecution of such suit. If however the second claimant is suing the stakeholder in the Circuit Court, this latter court, while unable to decree an interpleader, will stay all proceedings in its own court, until the suit in the State Court can be determined.⁵⁶

In the same way, when an interpleader bill is brought in a State Court, that court cannot enjoin an action brought by one of the claimants in the Circuit Court of the United States, because it is against public policy, and the comity due from the courts of one State to those of the United States, to enjoin the prosecution of suits previously commenced and pending before them.⁵⁷

Actions between claimants.—When there is a claimant at home and a claimant abroad, and the former receives

⁵⁴ *Whitridge v. Barry* (1874), 42 Md. 140.

⁵⁵ *Cook v. Scottish Equitable Life Ass. Society* (1872), 26 L. T. N. S. 571; see *Birch v. Corbin* (1784), 1 Cox 144.

⁵⁶ *City Bank of New York v. Skelton* (1846), 2 Blatchf. D. S. Circuit 14.

⁵⁷ *Schuyler v. Pellissier* (1838), 3 Edw. Chy. N. Y. 191.

the fund out of court, by reason of the non-appearance of the foreign claimant, the right to hold it is not conclusive in other jurisdictions. A life insurance company having been sued in Pennsylvania by the widow, and the administrator in Ohio also claiming, an interpleader order was made under which the insurance moneys brought into court were paid out to the widow, as the administrator did not appear in the Pennsylvania court. The administrator then sued the widow in an Ohio court for the moneys which she had recovered. It was held that the interpleader proceeding in Pennsylvania was not conclusive, and judgment was allowed against the widow.⁵⁵

Must always be a double liability.—There must always be two claimants to be restrained. A sheriff has therefore been refused protection in England from a claimant's threatened action, where, before having an opportunity to interplead, the execution creditor had notified the sheriff, that he admitted the claimant's title to the goods which had been seized.⁵⁶ But now by a rule having the force of a statute a sheriff may receive protection under such circumstances both in England and in Ontario.⁵⁷

Both claimants restrained.—In a case proper for interpleader, the court will not entertain an interpleading suit, simple to restrain one of the parties claiming the fund from prosecuting his claim, until the other party's claim has been disposed of.⁵⁸ The person seeking relief will be protected from several claimants.⁵⁹

There must be two claims capable of being restrained. No rule, therefore, for an interpleader will be granted, when a suit instituted by one of the claimants has already been stayed by injunction.⁶⁰ Where a statute prohibits the issuing of an injunction to stay attachment proceedings, the garnishee cannot call upon the attaching creditor to interplead

⁵⁵ *Cross v. Armstrong* (1887), 44 Ohio St. 613.

⁵⁶ *Sodeau v. Shorey* (1890), 12 T. L. R. 277.

⁵⁷ Eng. Order LVII., Rule 16 A.; Ont. Rule 1115.

⁵⁸ *Hastings v. Cropper* (1867), 3 Del. Ch. 165.

⁵⁹ *Newhall v. Kastens* (1873), 70 Ill. 156.

⁶⁰ *Arayne v. Lloyd* (1835), 1 Bing. N. C. 720.

with a third party claiming the debt, so that the attachment proceedings may be stayed.⁶⁴

Stay obtained in inferior court.—A stay of proceedings obtained in interpleader, in a court of inferior jurisdiction, cannot ordinarily operate to stay proceedings in a superior court. A sheriff, having obtained an interpleader order in a county court in British Columbia, and the claimant on the trial of the issue having failed to establish his title, nevertheless sued the sheriff for damages for seizing the goods for an amount which could only be recovered in a superior court. It was held, on appeal, by the Supreme Court of Canada, that the county court judgment being a decision of an inferior court, could not operate in respect of a cause of action in the superior court, and beyond the jurisdiction of the county court to entertain, and therefore the sheriff could not succeed by pleading the proceedings in the county court, unless he specially pleaded by way of estoppel, showing all the facts necessary to establish the estoppel.⁶⁵

Suit in Equity and action at Law.—When one defendant in a bill of interpleader is suing the plaintiff in equity, and the other is suing him at law, a court of chancery will always grant an injunction to restrain the suit in equity as well as the action at law.⁶⁶ Under the Connecticut statute, the court in exercising its chancery powers takes entire jurisdiction of the matter pending at law. The assumption of the jurisdiction in equity operates to suspend the proceedings in the court of law.⁶⁷

Proceedings not stayed.—There are a number of instances in which the courts will not protect a person seeking relief by way of interpleader from pending or threatened actions, because of acts of omission or commission on the part of such applicant. Thus, in many cases an interpleader and

⁶⁴ *McWhirter v. Halstead* (1885), 24 Fed. Rep. N. J. 828.

⁶⁵ *Davies v. McMillan* (1898), 13 Canada L. T. 267.

⁶⁶ *Crawford v. Fisher* (1842), 10 Sim. 479; *Prudential Assurance Co. v. Thomas* (1867), 3 Chy. App. p. 78.

⁶⁷ *Darrow v. Adams* (1874), 41 Conn. 525.

the accompanying injunction will be refused, when it appears that the party seeking relief has neglected to come promptly to the court as soon as claims are made, has by his actions caused his own difficulty, has colluded with one of the claimants, claims an interest in the subject matter, has some interest therein, does not stand indifferent between the claimants, asserts rights against the claimants or some or one of them, or, when he has already exercised a discretion in the matter; and in many other instances, where the particular circumstances do not warrant an interpleader, no stay of proceedings can be had.⁶⁸

Where a debtor, or trustee, has been sued, the proper course, under the English practice, is to apply for relief in the action under the interpleader Rules, and not under the section of the Judicature Act, because, if an order be made under the section, the judge making the order has no power to stay the proceedings in the action.⁶⁹

If application not prosecuted.—A person who comes to the court for relief by interpleader, should have his application disposed of promptly, or a pending action may not be stayed. Thus, where pending a sheriff's application the claimant commenced an action to which the sheriff pleaded, instead of pressing on his application, at the trial the sheriff was not allowed to set up the interpleader order, which in the meantime had been made.⁷⁰

Action must be referred to in order.—To ensure complete protection, a person seeking interpleader should notify all claimants, and have all pending actions properly disposed of by the interpleader order or judgment. If a person interpleads after an action has been brought against him, and fails to notify the claimant who is suing, the latter's action will not be stayed.⁷¹ Where a sheriff's interpleader order provided that no action should be brought against the

⁶⁸ See Chapter II.

⁶⁹ *Reading v. The School Board* (1886), 16 Q. B. D. 686; *M'Elheran v. London* (1886), 11 Ont. Pr. 181; 36 & 37 Vict. Imp. c. 66, s. 25, s.-s. 6; R. S. Ont. 1897, c. 51, s. 58, s.-s. 6.

⁷⁰ *Roblin v. Moodie* (1856), 2 Ont. Pr. 216.

⁷¹ *Burleigh v. England* (1838), 1 Arn. 103.

sheriff, and did not refer specifically to an action which was actually pending, and the claimant having brought his action on for trial, it was dismissed, but no costs were given the sheriff, because he might have had the whole matter disposed of on the interpleader.¹²

Rule that no cause restrained by injunction.—Since 1873, the English Judicature Act provides that no cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by injunction, but every matter of equity, on which an injunction against the prosecution of any such cause or proceeding might previously have been obtained, may be relied on by way of defence; provided that nothing in the act contained shall disable the court from directing a stay of proceedings in any cause or matter pending before it, if it shall think fit, and any person who might previously have been entitled to apply to the court to restrain the prosecution, shall still be at liberty to apply by motion in a summary way for a stay of proceedings in such cause or matter, either generally or so far as may be necessary for the purposes of justice, and the court shall thereupon make such order as shall be just.¹³ The same provision is also in force in Ontario,¹⁴ and in Manitoba.¹⁵

This provision is really supplemental to the jurisdiction in the interpleader rules, which allow the court to stay proceedings, and does not interfere with the inherent power of the courts to restrain a claimant from instituting proceedings,¹⁶ nor does it prevent an injunction being granted to stay proceedings in an inferior court.¹⁷

The provision just mentioned, prevents interpleader proceedings from being restrained by injunction. Where an interpleader order had been made at the instance of a sheriff, and the claimant having failed to give security, the

¹² *Aylwin v. Evans* (1882), 52 L. J. Chy. 105.

¹³ Eng. Jud. Act, 1873, s. 24, s.-s. 5.

¹⁴ R. S. Ont. (1897), c. 51, sec. 57 (8).

¹⁵ 58 & 59 Vict. Man. c. 6, s. 38, s.-s. 8.

¹⁶ *Besant v. Wood* (1879), 12 Chy. Div. p. 630.

¹⁷ *Hedley v. Bates* (1890), 18 Chy. Div. 498.

sheriff was proceeding to sell under the order, when the claimant commenced an action and obtained an injunction restraining the sheriff from selling, or remaining in possession, but on appeal the injunction was discharged as having been improperly granted.⁷⁹

No injunction until fund in court.—An injunction is generally an order, but formerly was always a writ issued under an order. By the common order for an injunction in an interpleader suit, the writ was directed to issue upon the fund in question being brought into court, and now an interpleader order must be conditioned that the injunction granted shall become operative only upon the money being paid into court,⁸⁰ or security given for its ultimate payment.⁸⁰ If an order does not make the bringing of the fund into court, a condition precedent to the issuing of the injunction, the order will be discharged.⁸¹ A person seeking interpleader will only be discharged as to the amount paid in.⁸²

If the subject matter is not a debt or money, and cannot be paid into court, the injunction will generally operate upon the applicant obeying the order of the court, with regard to its disposition.

In sheriff's interpleader, the injunction is not always dependent upon a prior payment or disposition of the property, as frequently after proceedings are stayed, the sheriff holds the goods until the time within which the claimant may give security has elapsed, and then he sells and pays into court. It depends upon his willingness to obey the directions of the court.

⁷⁹ *Wright v. Redgrave* (1879), 11 Chy. Div. 24.

⁸⁰ *Steveking v. Behrens* (1837), 2 M. & C. 581; *Pauli v. Von Melle* (1837), 8 Sim. 327; *Shaw v. Chester* (1834), 2 Ed. Chy. N. Y. 405; *Bender v. Sherwood* (1856), 15 How. Pr. N. Y. 258; *Gardiner v. Emerson* (1898), 91 Me. 535; *Cullen v. Dawson* (1877), 24 Minn. 66; *Williams v. Walker* (1846), 2 Rich. Eq. 291 S. Ca.; *Blue v. Watson* (1882), 59 Miss. 619; *Freyhan v. Berry* (1897), 49 La Ann. 305; *Bliss v. French* (1896), 76 N. W. Rep. 73 Mich. For early cases before the practice became settled, see *Surrey v. Waltham* (1785), 2 Anstr. 531 n; *Dungey v. Angove* (1789), 3 Bro. C. C. 36.

⁸¹ *Biggs v. Kouns* (1838), 7 Dana Ky. 405.

⁸² *Steveking v. Behrens* (1837), 2 M. & C. 581.

⁸³ *Bellingham Bay Boom Co. v. Brisbois* (1896), 14 Wash. 173.

It has been held in Ireland, that a defendant in an interpleader suit cannot require the plaintiff to bring the property into court, before the latter has applied for an injunction staying proceedings.⁴³

A stakeholder, the defendant in an action, is entitled to relief, though an application by the plaintiff to restrain the payment of the fund to a third party during the pendency of the action was denied, because such a denial is not conclusive of the validity of the plaintiff's claim.⁴⁴

Sheriff's action to recover goods.—A sheriff has sometimes been obliged to take proceedings against a claimant to recover possession of the goods, or their proceeds, in question upon an interpleader. Thus, where a sheriff levied upon goods in the possession of certain claimants who were agents for sale, but the claimants went on and completed the sale which they had advertised. The claimants failed to appear upon the interpleader proceedings instituted by the sheriff, and were barred. They then attempted to have the order rescinded, but failed, and an appeal was also dismissed. The sheriff then sued them for the proceeds. It was held that the claimants could not again plead the title upon which they claimed from the sheriff in the beginning. They had been forever barred from prosecuting their claim against the sheriff. It was said, that the intention of the Interpleader Act was to prevent further litigation, and it must be assumed that a judge making an interpleader order is right.⁴⁵ And where a sheriff on going to seize, was resisted by an auctioneer, who claimed the goods under a bill of sale, and upon the sheriff taking out an interpleader summons, the auctioneer disregarded it, and sold and removed the goods, it was held a contempt of court both at common law and under the Interpleader Act, and an order to attach the auctioneer was made absolute.⁴⁶

⁴³ *Glindennin v. O'Keefe* (1824), 1 Hog. 118.

⁴⁴ *Schweiger v. German Savg. Bank* (1890), 57 N. Y. S. 356.

⁴⁵ *Williams v. Richardson* (1877), 38 L. T. N. S. 505.

⁴⁶ *Cooper v. Asprey* (1868), 3 B. & S. 962.

Action on interpleader bond.—When a claimant has given security for the forthcoming of the goods, or the payment of their value, and the execution creditor succeeds upon the trial of the issue, the latter then sues the claimant and his sureties upon the interpleader bond if the condition is not observed.⁸⁷ An action upon the bond will also lie, if the claimant has been non-suited for the non-appearance at the trial of himself or his counsel, and the goods are not forthcoming.⁸⁸ In answer to an action on an interpleader bond, the claimant will not be allowed to set up the title which he asserted on the interpleader issue, in which judgment was given for the execution creditor.⁸⁹

Where an execution creditor succeeded on the issue, and the sheriff took and sold the goods and made his return, and the execution creditor afterwards sued the claimant on his bond that the goods should be forthcoming, it was held that the claimant might give in evidence that the sheriff had sold and applied the proceeds.⁹⁰

Where the claimant in a sheriff's interpleader is defeated on the issue, and pending an appeal, is sued upon his interpleader bond, and to avoid judgment in such action pays the claim of the execution creditor and takes an assignment of the judgment on which the execution was issued, such payment is voluntary and cannot be recovered back on the reversal of the judgment on the issue.⁹¹

One who has by several and distinct interpleader bonds, to different execution creditors, in separate issues, bound himself that the same goods shall be forthcoming in each case, if the respective execution creditors succeed, is responsible upon each of the conditions, if each is broken. And when judgment has been obtained upon one of such bonds, the court will not stay proceedings until the determination of the other issues in respect of the same goods by the other

⁸⁷ *Balkwell v. Beddome* (1859), 18 Upper Canada Q. B. 231.

⁸⁸ *O'Neil v. Wilt* (1874), 75 Pa. St. 283.

⁸⁹ *Ward v. Zane* (1860), 4 Phila. Pa. 68.

⁹⁰ *Hill v. Grant* (1865), 49 Pa. St. 200; and see also *Talcott v. Sicklessteel* (1861), 21 Upper Canada Q. B. 43.

⁹¹ *Ditman v. Raule* (1890), 194 Pa. St. 480.

execution creditors, in order to relieve the defendant from his liability upon the other interpleader bonds.⁸³

Injunction in favour of claimant.—On a bill of interpleader, the right to the property in dispute may be decided in favour of one defendant against the other, and if one defendant establishes his title and the other makes default, the court will decree payment to the one and award a perpetual injunction against the other.⁸⁴

If a sheriff take goods from the possession of an official receiver, or trustee in bankruptcy, his application will be refused, and he will be enjoined from all further proceedings to compel the receiver to interplead.⁸⁵

Solicitor and client.—It is not within the scope, of the implied authority, of the solicitor for a judgment creditor issuing a writ of execution, to direct the sheriff to seize particular goods;⁸⁶ although it has been held, that when a solicitor has special instructions from his client to do what he thinks best, he can properly bind his client, by giving a sheriff special instructions to seize under a *fi. fa.*⁸⁷ Where the subsequent acts of a client show that he has adopted his attorney's proceedings, the client will be bound.⁸⁸ A solicitor who has recovered judgment for a client under an ordinary retainer, has no authority without special instructions to engage in interpleader proceedings, which are substantially in the nature of a new action.⁸⁹

When solicitor will be protected.—An attorney or a solicitor is not liable to a claimant, whose goods have been wrongfully taken, where the writ was given to the sheriff to be acted upon in the usual course, without special direc-

⁸³ *Collins v. Schlichter* (1876), 1 Phila. Pa. 349.

⁸⁴ *Richards v. Salter* (1822), 6 John Chy. N. Y. 445.

⁸⁵ *Russell v. East Anglican Ry. Co.* (1850), 3 Mac. & G. 104.

⁸⁶ *Smith v. Keal* (1882), 9 Q. B. D. 340; *Pardee v. Glass* (1886), 11 Ont. p. 280; *Wallbridge v. Hall* (1887), 7 Canada L. T. 259; but see *contra* *Slaght v. West* (1886), 25 Upper Canada Q. B. 391.

⁸⁷ *Wilkinson v. Harvey* (1868), 15 Ont. 348.

⁸⁸ *Muirhead v. Sheriff* (1886), 14 Canada S. C. R. 735.

⁸⁹ *James v. Ricknell* (1887), 20 Q. B. D. 164; *Hackett v. Bible* (1888), 12 Ont. Pr. 482.

tions;²² and it may be proper upon a sheriff's application to include in the order, protection to the execution creditor, and also protection to his attorney.¹

When a solicitor directs the sheriff to seize particular goods,² or instructs him not to give up the goods after they have been seized, he may be liable to a successful claimant,³ and it is no defence that he was acting under the client's instructions.⁴ Where goods were seized, and the sheriff asked the solicitor for instructions, and the latter merely said, "use your own judgment," the solicitor was held not liable.⁵ Sometimes the solicitor is sued along with the execution creditor.⁶

Claimant's right against creditor.—In answer to an action by a claimant, an execution creditor cannot plead that the goods are not the claimant's, because the result of the issue in the claimant's favour is conclusive, that the goods are his, and the creditor is estopped from denying it.⁷

An execution creditor is not liable to a successful claimant, when the sheriff receives the writ and acts upon it without any particular instructions,⁸ nor does the fact that the creditor accepts and contests an issue, make him liable for the sheriff's previous seizure.⁹

The claimant by accepting an interpleader issue does not waive his right to bring trespass against the execution

²² *Phillips v. Findlay* (1867), 27 Upper Canada Q. B. 32; *McClevertie v. Massie* (1871), 21 Upper Canada C. P. 516.

¹ *Gaynor v. Salt* (1864), 24 Upper Canada Q. B. 180.

² *Phillips v. Findlay* (1867), 27 Upper Canada Q. B. 32; *Thomas v. Rowlands* (1886), 8 Times L. R. 148; *Power v. Fierling* (1870), 4 Ir. R. C. L. 404.

³ *Radenhurst v. McLean* (1835), 4 Upper Canada O. S. 281.

⁴ *Mooney v. Maughan* (1875), 25 Upper Canada C. P. 244.

⁵ *Stewart v. Cowan* (1877), 40 Upper Canada Q. B. 346.

⁶ *Henry v. Mitchell* (1875), 37 Upper Canada Q. B. 217.

⁷ *Harmer v. Gouinlock* (1861), 21 Upper Canada Q. B. 260.

⁸ *Phillips v. Findlay* (1867), 27 Upper Canada Q. B. 32; *O'Callaghan v. Cowan* (1877), 41 Upper Canada Q. B. 272.

⁹ *Kennedy v. Paterson* (1864), 22 Upper Canada Q. B. 556; *Phillips v. Findlay* (1867), 27 Upper Canada Q. B. 32; *Tilt v. Jarvis* (1858), 7 Upper Canada C. P. 145; *Wallbridge v. Hall* (1887), 7 Canada L. T. 259; *Woollen v. Wright* (1892), 31 L. J. Ex. 513; see also *May v. Howland* (1859), 19 Upper Canada Q. B. 66.

creditor,¹⁰ but a plaint for damages for trespass cannot be added to the question to be tried on the interpleader issue.¹¹

A claimant should not bring his action against the execution creditor until the determination of the issue,¹² and if he does, it will be at the risk of being stayed, and of having himself to bear the unnecessary costs he has put the execution creditor to.¹³ But, where there are questions outside of and not governed by the interpleader, the claimant may sue the creditor, as where an action was brought for damages for an independent tort, which had nothing to do with the property in the goods.¹⁴

Rule in Pennsylvania.—In Pennsylvania, if a claimant maintain his claim in a sheriff's interpleader, he will be barred of any action against the execution plaintiff for damages from the seizure, but if he refuse to become a party to the interpleader his action against the execution plaintiff still remains. The statute was not meant to compel the owner of property, seized under process against another man, to become a party to an issue in the interpleader, and there establish his right, under pain for his neglect or refusal, of losing all remedy for the trespass committed.¹⁵

Damages for which creditor liable.—An execution creditor is only liable to a successful claimant, for any damage which the latter has suffered through the seizure, from the time the sheriff goes into possession until the interpleader order is made, but none are recoverable for matters happening after the date of the order.¹⁶ The interpleader order is the act of the court, and the sale in such cases is the act of the sheriff under the order, for which the execution creditor is not responsible; and it follows, that the

¹⁰ *Cotton v. Stokes* (1853), 10 Upper Canada Q. B. 262.

¹¹ *Oliver v. Lewis*, 1880, W. N. 224.

¹² *Cotton v. Stokes* (1853), 10 Upper Canada Q. B. 262.

¹³ *Stokes v. Eaton* (1853), 3 Upper Canada C. P. 269.

¹⁴ *Hooke v. Ind. Coope and Co.* (1877), 36 L. T. N. S. 467.

¹⁵ *Larzelere v. Haubert* (1885), 100 Pa. St. 515; see also *Oliver v. Lewis* (1880), W. N. 224.

¹⁶ *Lister v. Northern Ry. Co.* (1889), 10 Upper Canada C. P. 408; *Kennedy v. Patterson* (1864), 22 Upper Canada Q. B. 556; *Conboy v. Doll* (1894), 14 Canada L. T. 226.

claimant can get no damages, for the sale of his goods at less than their real value, when the sale is under the interpleader order.¹⁷

A claimant, having succeeded and obtained his property as well as a judgment against the execution creditor for his costs, then sued both the execution creditor and his attorney for damages and recovered a verdict in which was included the amount of costs for which he already had judgment. It was held on appeal, that the same damages must be recovered against both, but, that the verdict must be reduced by the amount of the costs for which he already had judgment, as that amount could not again be recovered as damages against the execution creditor.¹⁸

Protection to execution creditor.—The court has authority by an interpleader order, to restrain an action against the execution creditor in a proper case, as well as against the sheriff.¹⁹

A claimant, though barred by the order from bringing any action against the sheriff, may still have his action against the execution creditor, when the latter has been active in putting the sheriff in motion,²⁰ or where the execution creditor has assisted the sheriff in executing the writ,²¹ or where he has directed the goods to be seized and has attended at the sale and bid,²² or where the creditor either by himself or his attorney has directed the sheriff to seize particular goods.²³ A creditor directing an unlawful seizure, and afterwards instructing the sheriff to

¹⁷ *Walker v. Olding* (1862), 1 H. & C. 621; *Appelby v. Withall* (1860), 8 Upper Canada C. P. 397; *Henry v. Mitchell* (1875), 37 Upper Canada Q. B. 217; *Reid v. Murphy* (1887), 12 Ont. Pr. 246 & 338; *McMasters v. Bank* (1881), 29 P. L. J. Pa. 310; see R. S. Ont., 1897, c. 77, s. 22 (6).

¹⁸ *Power v. Fleming* (1870), 4 Ir. R. C. L. 404.

¹⁹ *Carpenter v. Pierce* (1858), 27 L. J. Ex. 143; *May v. Howland* (1859), 19 Upper Canada Q. B. 66; *Buffalo v. Hemmingway* (1863), 22 Upper Canada Q. B. 562; *Gaynor v. Salt* (1864), 24 Upper Canada Q. B. 180.

²⁰ *Bellhouse v. Gunn* (1861), 20 Upper Canada Q. B. 559.

²¹ *Park v. Taylor* (1852), 1 Upper Canada C. P. 414.

²² *Gray v. Fortune* (1859), 18 Upper Canada Q. B. 253.

²³ *Lewis v. Jones* (1836), 2 M. & W. 208; *Phillips v. Findlay* (1867), 27 Upper Canada Q. B. 32.

withdraw, will still continue liable, if the sheriff do not at once withdraw.²⁴

Injunction granted ex parte.—If the plaintiff, in an interpleader suit, has already paid the fund into court, or offers by his bill to do so, he will be allowed to *apply ex parte* upon supporting the allegations in his bill by an affidavit, without waiting for the appearance of the defendants.²⁵

When it may be dissolved.—A defendant, upon appearing may, however, move to dissolve the injunction thus obtained, but as a general rule the court will allow the stay to continue until the hearing.²⁶ If, however, the court sees that the continuance of the injunction in full force, may have the effect of enabling a stranger to deprive the parties to the suit of the legal rights which they had already acquired, the injunction will be suspended so far as to allow proceedings at law to go on to judgment.²⁷ A plaintiff's delay in getting in the answer of one claimant, is also a ground upon which the other may specially apply to have the injunction staying proceedings dissolved.²⁸

How applied for.—A defendant in equity cannot ask protection in the suit against him, he is required to file a bill of interpleader.²⁹ Under interpleader acts and codes, however, the practice is reversed. A person seeking to stay proceedings thereunder must apply in the cause or matter pending, and cannot bring a new action for the purpose.³⁰ It has therefore been held, that when a defendant makes an independent application for relief by interpleader, not entitled in the action against him, the court has no jurisdiction to stay proceedings in the action.³¹

²⁴ *Henry v. Mitchell* (1875), 37 Upper Canada Q. B. 217.

²⁵ *Warrington v. Wheatstone* (1821), 1 Jac. 202; *Sieveking v. Behrens* (1837), 2 M. & C. 581; *Jew v. Wood* (1841), Cr. & Ph. 185; 3 Beav. 579; *Australian v. Broadbent* (1877), 3 Victorian L. R. 188; see *contra* *Croggon v. Symons* (1818), 3 Mad. 130.

²⁶ *Jew v. Wood* (1841), 3 Beav. 579.

²⁷ *Sieveking v. Behrens* (1837), 2 M. & C. 581.

²⁸ *Hyde v. Warren* (1815), 19 Ves. Jun. 322.

²⁹ *Birch v. Corbin* (1784), 1 Cox 144.

³⁰ *Salt v. Cooper* (1880), 16 Chy. Div. p. 531.

³¹ *Reading v. School Board* (1886), 16 Q. B. D. 686.

Actions which may be stayed.—The only actions which can be stayed, are actions in which the person seeking relief is himself a party defendant, and do not include an action by one claimant against the other, even though in respect of the subject matter in the possession of the person seeking interpleader.²²

It must also be remembered, that the action of a claimant, who has not been notified of the interpleader proceeding, will not be stayed;²³ and that a stakeholder will still remain liable to the claim of any claimant who has not been brought in, as the latter cannot be bound by the order or decree made in his absence.²⁴

Practice as to injunctions.—Under the early practice in equity, the plaintiff in an interpleader suit applied at once upon filing his bill for a special injunction to stay all proceedings, upon payment of the money into court, without first obtaining the common injunction.²⁵ This injunction did not, like the common injunction, leave the plaintiff at law at liberty to demand a plea and proceed to judgment, but it stayed all proceedings.²⁶

Under the English practice, it has been held, that a stakeholder cannot draw up a rule for a stay of proceedings unless notice has first been given to the claimants.²⁷ A sheriff, however, usually obtains a stay of proceedings upon his *ex parte* application for an interpleader summons, but when a sheriff applies by motion, as in Ontario, it is upon notice to the other parties.²⁸

It has been said in New York State, that in an action of interpleader the plaintiff cannot move for an injunction until the defendants have put in their defence.²⁹

²² *Australian Mont de Piete Co. v. Ward* (1885), 11 Victorian L. R. 798.

²³ *Burleigh v. England* (1838), 1 Arnold 106.

²⁴ *Reynolds v. Aetna Life Ins. Coy.* (1896), 6 App. Div. 254 N. Y.; *Bain v. Lyle* (1871), 68 Pa. St. 60.

²⁵ *Vicary v. Widger* (1826), 1 Sim. 15.

²⁶ *Warrington v. Wheatstone* (1821), 1 Jac. p. 205.

²⁷ *Smith v. Wheeler* (1835), 3 Dowl. 431.

²⁸ Ont. rule 110f.

²⁹ *Washington v. Lawrence* (1865), 28 How. Pr. N. Y. 425.

If the defendants to a bill of interpleader have appeared, it is the practice in chancery, to serve them with notice of the motion for an injunction, but it is not then necessary for the plaintiff to support his motion with an affidavit of facts, other than the affidavit negating collusion.⁴⁰

In Chancery, though the defendant should allege, that the plaintiff has so dealt with him as to render it an improper case for interpleader, an injunction will still be granted, unless the court is satisfied, either that the allegation is true, or at least, that whether it is so or not is a substantial question to be tried.⁴¹ And if it should appear at the hearing that an injunction has been improperly granted, it will then be dissolved.⁴²

The present English rules provide, that if the application is made by a defendant in an action, the court or a judge may stay all further proceedings in the action,⁴³ that if the third party claiming appears he may be substituted as defendant,⁴⁴ and if he does not appear, or having appeared neglects or refuses to comply with any order made after he appears, he may be forever barred.⁴⁵ These rules are founded on the Interpleader Act of 1831. The same provisions are in force in Ontario,⁴⁶ and in the other Canadian Provinces where the English Judicature Act has been adopted.

The Courts however exercise a wider jurisdiction in staying and restraining present and prospective proceedings, than the wording of these rules would seem to allow. Ample authority for a wider discretion, in such matters, is to be found in the *omnibus* rule which allows the court in interpleader proceedings to do whatever may be just and reasonable, following the established practice of the courts.⁴⁷

⁴⁰ *Walbanke v. Sparks* (1827), 1 Sim. 385; *Fry v. Watson* (1829), 7 L. J. Chy. 175; *Meredyth v. Molloy* (1841), Fl. & K. 195; *Hoggart v. Cutts* (1841), Cr. & Ph. 190.

⁴¹ *Jew v. Wood* (1841), Cr. & Ph. 185; 3 Beav. 579.

⁴² *Hoggart v. Cutts* (1841), Cr. & Ph. 190.

⁴³ Order LVII., rule d.

⁴⁴ Rule 7.

⁴⁵ Rule 10.

⁴⁶ Ont. Rules 1106, and 1108.

⁴⁷ Eng. Ord. LVII., r. 15; Ont. Rule 1122.

In the United States, the various interpleader codes provide, that a third party claiming may be substituted in the defendant's place, and that the defendant may be discharged from liability to either party upon paying into court the amount of the debt, or upon delivering the possession of the property, or its value, to such person as the court directs.⁴³ The applicant cannot have his order for relief, until both claimants have had an opportunity of answering his motion.⁴⁴ The fact that a stakeholder is discharged from liability to either claimant, means by implication that present proceedings are stayed and future ones enjoined.

⁴³ See Appendix.

⁴⁴ *Washington v. Lawrence* (1865), 28 How. Pr. N. Y. 435.

CHAPTER IX.

DISPOSITION OF SUBJECT MATTER.

Disposition pending trial.—It is always necessary to make some interim disposition of the property in question, until the contest between the claimants is decided. If a fund or debt be in question, the money can readily be paid into court, but if the subject matter be property other than money, it must be sold and the proceeds paid into court, or it may be stored, or delivered to one of the claimants upon his giving security. Thus, it has been said of sheriff's interpleader, that there are two ways of proceeding, money may be brought into court, or security given, in default of which the sheriff sells, or he may remain in possession of the goods. He cannot simply withdraw, for the goods may be the debtor's, and if given up the benefit of the execution would be lost.¹

If a sheriff have already sold the goods, he will be directed to pay the whole amount into court, suspending his claim to poundage, his right to which will depend upon whether the execution creditor succeeds or not.²

Goods may be sold.—The court has always jurisdiction over the subject matter brought before it, to dispose of it in such manner as according to all the circumstances shall appear to be just and reasonable.³ There is jurisdiction therefore, to order, unless a claimant pay the value of the goods

¹ Wright v. Redgrave (1879), 11 Chy. D. p. 33.

² Barker v. Dynes (1832), 1 Dowl. 160; Turner v. Crosier (1801), 14 Ont. Pr. 272.

³ Abbott v. Richards (1846), 15 M. & W. p. 107; Eng. Order L.VII., r. 15; Ont. Rule 1122.

into court or give security for them, that they be sold;⁴ and it does not matter, that the claimant claims the property absolutely, and not by way of security only.⁵ But the court will not order a sale before the claimant is served,⁶ and the usual practice will be varied, if the claimant can show special grounds, rendering it unjust to direct a sale if security be not given.⁷

Capacity in which sheriff seizes.—The execution creditor is never to be looked upon as in possession of the goods seized. The actual possession is that of the sheriff, who is not a mere bailiff for the execution creditor, but acts in obedience to the judgment of the court, and as its officer. The goods taken in execution are therefore not in the possession of any party, but of the law.⁸

Claim under bill of sale.—The English and Ontario rules specially provide, that when a claimant alleges title to the goods seized, under a bill of sale or otherwise, by way of security for a debt, the court may order a sale of the whole or a part, and may direct the application of the proceeds in such manner and upon such terms as may be just.⁹ But a sheriff is not compelled to interplead, so that a creditor may have the benefit of this rule; he may, if he is satisfied with the validity of the security, withdraw, and make a return of *nulla bona*. The court will not, in all cases, direct a sale, but may leave the claimant to nurse his security.¹⁰ If a sale be ordered, the claimant can only be paid such sum, as his affidavit, filed on the motion, shows to be owing to him.¹¹

⁴ *Dillon v. Conover* (1875), 2 W. N. C. Pa. 126; *Exposition v. O'Brien* (1878), 7 W. N. C. Pa. 82; *Hallowell v. Schnitzer* (1877), 6 W. N. C. Pa. 469.

⁵ *Bank of Nova Scotia v. Hope* (1898), 9 Man. 37.

⁶ *Kennedy v. Lavan* (1884), 18 Ir. L. T. B. 5.

⁷ *Victor v. Cropper* (1886), 8 Times Rep. 110.

⁸ *Richards v. Jenkins* (1887), 18 Q. B. D. 451; see also *Forster v. Clowser* (1897), 2 Q. B. 362.

⁹ Eng. Order LVII., r. 12; Ont. Rule 1112. See also in Appendix other jurisdictions in which the English Rules are in force.

¹⁰ *Pearce v. Watkins* (1861), 2 F. & F. 377; *Scarlett v. Hanson* (1888), 12 Q. B. D. 213.

¹¹ *Hockey v. Evans* (1887), 18 Q. B. D. 390.

This rule has been said to confer new and valuable powers. Formerly, if the claimant established title to goods of however great value, by way of security for however small a sum, the execution was defeated absolutely, as the court had no power to provide for the realization of the security, and the disposal of the surplus, or for the payment of the debt and the discharge of the security by the execution creditor. This defect is now mended, and a convenient and much used scheme for defeating creditors is interrupted. The rule is not intended to deprive secured creditors of the benefit of their security, and when this will, or very likely will, be the effect of a sale, the court ought not to direct a sale, but ought to direct the sheriff to withdraw. Three cases arise in practice. First, when the security is ample and the bill of sale holder tries to assert his rights so as to defeat the execution. In such a case a sale will be ordered. The next, is where the security is plainly deficient, and there can be no surplus, when the only proper course is to direct the sheriff to withdraw. The third case, is when it is doubtful, whether the security is sufficient to pay off the secured creditor or not, and the proper course is to say, that unless the execution creditor will guarantee the secured creditor against loss by sale, a sale will not be ordered.¹²

Where a chattel mortgage had still 17 months to run, with interest at 60 per cent., it was held proper to order a sale, and just that the claimant should receive interest only up to the time he was paid, and not as provided in his contract. The order for sale was made in this case, though it was alleged that the money lender would be out his expenses, as the interest for the shorter period did not cover them.¹³

Effect of a sale.—The sale gives the purchaser a good title, although in a sheriff's case, for instance, it turns out

¹² *Stern v. Tegner* (1896), 1 Q. B. 37; *Forster v. Clowser* (1897), 2 Q. B. 362.

¹³ *Forster v. Clowser* (1897), 2 Q. B. 362.

that the goods were the property of the claimant at the time of the seizure. The claimant has an opportunity of preventing a sale by paying into court or by giving security. If he fails to do this, the goods are sold, and the proceeds paid into court to abide the result. The necessary implication is, that it is intended that a title shall be conferred on the purchaser. What would his position be, if it were otherwise. He knows nothing of what has gone before the sale, he pays his money into court, and has no means of getting it back again. The conclusion is irresistible, that the purchaser must have a good title from the sheriff.¹⁴

Capacity in which sheriff sells.—In England, it has been said, that a sale by a sheriff under an interpleader order does not alter the capacity in which he sells, or that in which he holds the proceeds. The sale by the sheriff is in his capacity as sheriff under the execution, and not under some trust or duty imposed by the Interpleader Act, and such a sale, taken in connection with the previous seizure, constitutes an execution completed by seizure and sale.¹⁵ In Ontario, on the other hand, it is considered that when an interpleader order is made at the instance of the sheriff, the special jurisdiction of the court under the Interpleader Rules arises, by which the writ of execution ceases to operate, and the sheriff in selling acts not for the execution creditor, but for the court under the interpleader order.¹⁶ So, when goods are sold by a stakeholder under an interpleader order, it is the act of the court, and an unsuccessful claimant cannot afterwards sue the stakeholder for damages for conversion.¹⁷

Receiver appointed.—Instead of ordering a sale, the court will sometimes appoint a receiver of the subject matter in dispute. Thus, where six horses, four cabs, etc., a going and remunerative concern, had been seized by a sheriff, a receiver and manager was appointed at the claimant's

¹⁴ *Goodlock v. Cousins* (1897), 31 Q. B. 558.

¹⁵ *Heathcote v. Livenley* (1887), 19 Q. B. D. p. 287.

¹⁶ *Reid v. Murphy* (1887), 12 Ont. Pr. ps. 240, 338.

¹⁷ *Ross v. Edwards* (1894), Oslar, J., Ont. Ct. of Appeal, not reported.

expense. It was provided, that if the claimant succeeded, the expenses were to be paid by the execution creditor, and that the receiver should give security.¹⁸ Where a claimant was in possession of goods at the time of seizure, as a receiver, he was ordered to hold them subject to the further order of the court.¹⁹

Applicant to retain possession.—Sometimes the applicant is directed to continue in possession pending the trial, but the claimant who desires it must pay the possession expenses during such term. This course is expensive, and is seldom adopted.²⁰

Where goods seized were manufactured materials, the product of a going concern, a direction in the interpleader order that the sheriff should continue in possession until the final disposition of the issue, was upheld against the contention of the execution creditor that the sheriff should be directed to sell the goods, if the claimant did not pay into court or give security.²¹

Order in sheriff's cases.—In sheriff's cases, the usual direction is, that the sheriff shall withdraw, upon the claimant paying into court the appraised value of the goods together with the expenses of appraisement, or the amount of the execution, whichever is least; or upon his giving security for the same least amount, and upon paying the sheriff his possession money from the return of the application. If the claimant fail to take advantage of this provision, within the time limited, the sheriff is directed to sell, and pays the proceeds into court, less the expenses of sale and his possession money from the date of the order.²² The sheriff cannot be called upon to part with the goods, without being paid what is due him for possession expenses.²³

Applicant should obey order.—The applicant should be careful not to withdraw from possession, until the proper

¹⁸ *Howell v. Dawson* (1884), 13 Q. B. D. 67.

¹⁹ *Purkiss v. Holland* (1887), 31 Sol. J. 702.

²⁰ *Wright v. Redgrave* (1879), 11 Ch. D. p. 38; Ont. Rule 1122.

²¹ *Farley v. Pedlar* (1901), 21 Canadian L. T. 294.

²² See Pa. P. L. No. 80 of 1897.

²³ *Langton v. Horton* (1841), 3 Beav. 464.

time. Where a sheriff temporarily withdrew, after an order had been made, it was held that the goods were no longer in *custodia legis*, and a landlord might distrain, although he knew that interpleader proceedings were pending.²⁴

After an order had been made directing an issue, a sheriff withdrew from possession, because the execution creditor failed to furnish the rent claimed by the debtor's landlord. The court, then allowed the sheriff an order providing for his costs, and discharged the order for the trial of an issue.²⁵

Part of fund not in dispute.—When a fund has been paid into court, and it appears that one claimant claims the whole, and the other one half of it, it is proper to order payment out of one half to the claimant claiming the whole, notwithstanding that the claimant to one-half objects, alleging that the other claimant owes him in other matters. The object of the interpleader is to determine the rights of the claimants to the fund which was in the applicant's hands, and not for the purpose of having adjusted other matters of account and dealings between the claimants.²⁶

Sheriff's duty under order.—After an order has been made, the sheriff should always enquire whether the claimant proposes to give security by bond, or to pay into court. If he elects to do either, the sheriff should then ascertain whether the claimant desires the goods appraised. Where a sheriff, upon being asked to have the goods appraised, failed to do so, and then sold them because security was not given within the time limited, it was held in an action against him that, having by his neglect prevented the claimant from complying with the order, he was estopped from saying that the claimant's non-compliance justified the sale; and, that the effect of the sheriff's neglect was either to deprive him of his protection, or to operate as a waiver of the time limited for giving security.²⁷

²⁴ *Cropper v. Warner* (1883), 1 C. & B. 152.

²⁵ *Lawson v. Carter*, W. N. (1894), 6.

²⁶ *Zillman v. Zillman* (1892), 23 Atl. Rep. 1098; 75 Md. 372; *In re Mersey Dock Board* (1883), 11 W. B. 283.

²⁷ *Black v. Reynolds* (1878), 43 U. C. Q. B. 308.

It is also the sheriff's duty, before proceeding to sell, to ascertain whether the payment has been made by the claimant into court, or whether in the alternative he has given security, and if he has done so, the sheriff should then withdraw from possession.²⁸

Inventory of goods seized.—It is of considerable importance to the claimant, to know exactly what goods have been seized. It has been held in England, however, that the sheriff is not obliged to furnish a claimant with particulars of the goods he has seized, because it would be a great burden on him, and put him in great difficulties, if he were obliged to describe each article he has seized in order to satisfy any one who might come forward as a claimant.²⁹

In Ontario, when a sheriff interpleads in the High Court, and the goods are not more than \$400 in value, a list of them, and of the value placed upon them, must be set out in the sheriff's affidavit.³⁰

If an issue is directed, and the claimant is allowed to give security, the sheriff must of course prepare an inventory for the purposes of appraisal, and in Pennsylvania he is required to file this without being notified to do so, and without consulting the parties.³¹

It is usually a convenient practice for a sheriff to make an inventory at an early stage, so that he may know, whether the claimant will claim all of the articles seized, and whether the execution creditor will take an issue as to the whole of them.

Claimant may take goods on giving security.—It often happens, that, for some reason, one claimant desires immediate possession of the subject matter, to continue pending the trial of the issue. The court will always allow a claimant to take the goods upon giving security by bond

²⁸ *Black v. Reynolds* (1878), 43 U. C. Q. B. 398.

²⁹ *Bauly v. Krook* (1891), 65 L. T. 377.

³⁰ *Close v. Exchange Bank* (1885), 11 Ont. Pr. 191; Ont. Rule 1125.

³¹ *Conley v. Gartner*, 8 Lanc. Pa. 201; *Lents v. Witte*, 1 T. & H. Pr. Pa. 886; *Parmentier v. Stewart*, 1 T. & H. Pr. Pa. 886.

with sureties, or by a payment into court.³² In sheriff's cases there is usually no objection to this course, as the execution creditor does not want the goods, but their value in money. In a stakeholder's case, if the two claimants both desire possession, the court can direct the subject matter to be stored.

If the claimant is a receiver, it is not necessary that he, an officer of the court, who has no personal interest in the matter, should bring money into court. He will be directed to hold the goods subject to further order, which gives full protection to the execution creditor.³³

Rule in Pennsylvania.—In Pennsylvania a more reasonable practice has long prevailed. If a claimant in sheriff's interpleader allege that he does not derive title from or through the execution debtor, and is in exclusive possession, the court will not require security from him other than his own bond,³⁴ but this will only be allowed in a clear case.³⁵ The court will permit the claimant to be cross-examined, and will also permit counter affidavits to be filed,³⁶ but the claimant is not obliged to submit to examination before the time allowed for filing his bond.³⁷

A bond without security has accordingly been allowed, where the claimant gave the debtor the goods as his agent to sell on commission,³⁸ where the goods were purchased by the claimant at a sheriff's sale,³⁹ where they were purchased by him from the debtor's assignee for creditors,⁴⁰ and where the claimant was a municipal corporation.⁴¹ When

³² See *Brown v. Ludham* (1843), 6 M. & G. 177; *Goodlock v. Cousins* (1897), 1 Q. B. 558.

³³ *Purkiss v. Holland* (1887), 31 Sol. J. 702.

³⁴ *Haywood v. Ashman* (1871), 8 Phila. Pa. 235; *Becker v. Miller* (1874), 1 W. N. C. Pa. 83; *Hartman v. Schofield* (1874), 1 W. N. C. Pa. 154; Pa. Laws of 1897, No. 80, s. 5; *Lansdorf v. Bach* (1874), 1 W. N. C. Pa. 147; *Dallet v. Bond* (1875), 1 W. N. C. Pa. 358; *Buechley v. Walker*, 1 Leg. Rec. Pa. 329.

³⁵ *Bailey v. Vehmeier* (1877), 6 W. N. C. Pa. 271.

³⁶ *Clymer v. Shaw*, 11 C. C. Pa. 352.

³⁷ *Stokes v. McKinney*, 34 W. N. C. Pa. 123.

³⁸ *Faulkner v. Voight*, 1 T. & H. Pr. Pa. 905; *Landenberger v. Landenberger* (1893), 40 L. I. Pa. 100.

³⁹ *Bank v. Sharp* (1874), 1 W. N. C. Pa. 6.

⁴⁰ *Smith v. Stoddart* (1879), 8 W. N. C. Pa. 390.

⁴¹ *City v. Hiltner* (1879), 9 W. N. C. Pa. 541.

a claimant has been allowed to give his own bond, his administrator after his decease, will not be required to give security.⁴²

In Pennsylvania, an assignee for creditors must give a bond with security,⁴³ so must a firm claiming goods seized under an execution against one of the partners,⁴⁴ as well as a non-resident claimant,⁴⁵ and a foreign corporation.⁴⁶

When a claimant is a married woman her husband's bond cannot be received,⁴⁷ but where she claims as administratrix of a former husband, her second husband will be accepted as surety on the bond;⁴⁸ and if the surety sign her bond, it is not necessary that she or her husband sign it.⁴⁹

But, she will be permitted to file her own bond without security, where she makes affidavit, that she is the sole and absolute owner of the property levied on, and that she has not derived her title from or through her husband, and shows affirmatively her manner of acquiring title.⁵⁰ A married woman will be permitted to give her own bond when she is a feme sole trader.⁵¹ A husband may sometimes give his own bond, when he claims goods levied on under an execution against his wife.⁵² A married woman is not a proper surety to a claimant's bond.⁵³

⁴² *Doane v. Spanogle* (1881), 12 W. N. C. Pa. 36.

⁴³ *Anderson v. Tyndale* (1874), 1 W. N. C. Pa. 144.

⁴⁴ *Vent v. Pashley* (1879), 9 W. N. C. Pa. 559.

⁴⁵ *Scatchard v. Mnfg. Co.* (1880), 10 W. N. C. Pa. 452.

⁴⁶ *Emerson v. Grattan* (1876), 4 W. N. C. Pa. 574.

⁴⁷ *Jacobs v. Wells*, 1 T. & H. Pr. Pa. 906.

⁴⁸ *Whitesides v. Vickers* (1874), 36 L. I. Pa. 16.

⁴⁹ *Warder v. Davis* (1880), 35 Penn. St. 74; *Brooks v. Hoffman* (1886), 2 C. C. Pa. 55.

⁵⁰ *Kutschmann v. Schloss* (1890), 25 W. N. C. Pa. 353; *Atkinson v. McNaughton* (1891), 27 W. N. C. Pa. 438; *Cherry v. Nolan*, 47 L. I. Pa. 70; *Grabau v. Hirschfeld*, 12 C. C. Pa. 208; *Garrison v. Settle*, 12 C. C. Pa. 665; *Contra Barrett v. Gross* (1875), 2 W. N. C. Pa. 324; *Sinclair v. Hoyer* (1886), 19 W. N. C. Pa. 181; *Souders v. Stauffer*, 11 Lanc. Pa. 323.

⁵¹ *Hahn v. Schmeyer* (1877), 6 W. N. C. Pa. 271; *Contra Nice v. Hing* (1876), 4 W. N. C. Pa. 478.

⁵² *Phillips v. Quigley* (1881), 38 L. I. Pa. 102.

⁵³ *Mullin v. Pascoe* (1880), 8 Ont. Pr. 372. This was a decision before married women were given by statute the complete rights to property which they now enjoy.

Rule in Ontario.—The practice in Ontario, requires a claimant to give security to the satisfaction of some officer, before being allowed to take the subject matter. Nothing is said as to the form of the security, but it is usual to give it in the shape of a bond, with one or more sureties. The addition of another person, is not inherent in the meaning of the term "security." When the claimant is a public bank, the officer settling the security does not need to call for affidavits, in order to satisfy himself of its substantial condition; and, following the rule, that an absentee is not required to give security for costs, when he is the owner of available tangible property within the jurisdiction, the bond of a bank alone should in interpleader be accepted as sufficient security.⁵⁴

Form of interpleader bond.—An interpleader bond, under the English practice, is usually a money bond, made by one claimant in favour of the other, with two sureties. In sheriff's interpleader it is made in favour of the execution creditor, although formerly it was given to the sheriff.⁵⁵ Sometimes a claimant is allowed to give a bond conditioned, that he will produce the goods to the sheriff, if he fails in the issue, and will pay such damages to the execution creditor as the latter shall sustain by reason of the detention of the goods.⁵⁶

In Pennsylvania the bond is to the commonwealth, and is conditioned that he will maintain his title, or pay the value of the goods, and is for the benefit of the execution creditor, or any one else who shall be adjudged entitled to the whole or a part.⁵⁷

Amount of bond.—The amount of a claimant's bond in sheriff cases is either in double the value of the goods, or in double the amount of the execution, whichever is

⁵⁴ *Ontario Bank v. Merchants Bank of Halifax* (1901), 1 Ont. 235.

⁵⁵ *Appelby v. Withall* (1860), 8 Upper Canada C. P. 397.

⁵⁶ *Ashdown v. Nash* (1885), 3 Man. 87. See also *Balkwell v. Beddome* (1859), 18 Upper Canada Q. B. 232; *Talcott v. Sickles* (1861), 21 Upper Canada Q. B. 45.

⁵⁷ Pa. P. L. No. 80 of 1897.

least.⁵⁰ In case of a dispute the amount will be settled by the sheriff's appraisement,⁵¹ which will not, as a general rule, be set aside unless fraud or misconduct is alleged on the part of the sheriff or his appraisers.⁵²

Unfinished parts of patented machines should, in fixing the amount of the claimant's bond, be having no interest in the patent, be valued at what they are worth in the construction of similar unpatented machines.⁵³

The claimant is only bound to give one bond, and not a bond for each execution, although the sheriff may have different executions under which several creditors may be entitled to share in the fruit of the levy if the claimant fails.⁵⁴

The bond given by a claimant cannot be considered or declared assets of a judgment debtor.⁵⁵

When bond given.—The interpleader order usually limits a time, within which the bond is to be given by the claimant. In Pennsylvania, when an issue has been granted, the claimant must file his bond within twelve days after the issue has been granted,⁵⁶ where he neglected to give bond for a year and nine months, it was held that the claimant could not be allowed an issue,⁵⁷ but the court may order the goods to be sold, failing a bond, and the proceeds will remain in court pending the trial of the issue.⁵⁸

Allowance of bond.—The bond is settled before some officer of the court, named in the order, in the presence of both claimants. As the applicant does not as a rule attend upon the settling, he should generally have produced to

⁵⁰ *Commith v. Chapman* (1877), 6 W. N. C. Pa. 15; *Chandler v. Zeigler* (1880), 10 W. N. C. Pa. 338; *Sharpless v. Merriman* (1884), 2 Chest. Pa. 375; *Weldin v. Booth*, 1 C. C. Pa. 169; *Contra Rinehart v. Bodine*, 3 Kulp. Pa. 85; Pa. P. L. No. 80 of 1897.

⁵¹ *Usser v. Buch*, 5 Lanc. Pa. 277; Pa. P. L. No. 80 of 1897.

⁵² *Wartel v. Bear*, 10 Lanc. Pa. 401; *Stauffer v. Souder*, 11 Lanc. Pa. 323.

⁵³ *Weldin v. Booth*, 1 C. C. Pa. 169.

⁵⁴ *Richardson v. Brunswick* (1880), 10 W. N. C. Pa. 81; *Rinehart v. Bodine*, 3 Kulp. Pa. 85; Pa. P. L. No. 80 of 1897.

⁵⁵ *McNider v. Baker* (1864), 10 Upper Canada L. J. O. S. 103.

⁵⁶ *Conley v. Gartner*, 8 Lanc. Pa. 201.

⁵⁷ *Wolf v. Wolf* (1882), 1 Del. Pa. 380.

⁵⁸ Pa. Statute (1897), No. 80, sec. 12.

him some official notice that the security has been allowed. Where a sheriff withdrew upon receiving information from the claimant, that security had been given, although the claimant had been guilty of deceit in getting the sureties approved, the sheriff was held justified.⁶⁷

Title to goods when bond given.—A claimant upon giving a forthcoming bond, acquires a right of possession, which includes a right of removal, until the issue is determined against him, when his right of possession ceases. His custody is substituted for that of the sheriff. The property is not withdrawn from the custody of the law, but is still subject to the lien of the execution. In the hands of the claimant, under the bond for its delivery to the sheriff, the property is as free from the reach of other processes, as it would have been in the hands of the sheriff.⁶⁸

The goods cannot be levied upon and sold under a subsequent execution, because, if taken from the claimant, he would be deprived of the power to deliver them in conformity with the condition of his bond;⁶⁹ nor can the execution creditor issue another writ and levy upon the same stock of goods.⁷⁰ The goods in the claimant's possession may still be distrained for rent,⁷¹ and though the landlord joins in the bond, that the goods will be forthcoming, it will not prejudice his claim for rent.⁷²

Nor does the payment of a deposit into court transfer the property in the goods to the claimant. It does not give

⁶⁷ *Darby v. Waterlow* (1868), L. R. 3 C. P. 453.

⁶⁸ *Hagan v. Lucas* (1836), 10 Pet. U. S. 400; *Seeley v. Garey* (1885), 109 Pa. St. 301; *Hildebrand v. Smith*, 8 Lanc. Pa. 179; *Passavant v. Gummey* (1891), 32 W. N. C. Pa. 217; *Johnston v. Minor, T. & H. Pr. Pa. Sec. 1143*. As to a claimant's position, when he gives bonds to different execution creditors, see *Collins v. Schlichter* (1876), 11 Phila. Pa. 349.

⁶⁹ *McLemore v. Benbow* (1851), 19 Ala. 76; *Ward v. Whitney* (1878), 7 W. N. C. Pa. 95; *Ware v. Deacon*, 7 C. C. Pa. 368; *Contra Battersby v. Haubert* (1878), 8 W. N. C. Pa. 94.

⁷⁰ *Shier v. Hettle* (1874), 1 W. N. C. Pa. 6; *Nealon v. Flynn*, 1 Kulp. Pa. 149; *Contra Taylor v. Bonaffon* (1885), 17 W. N. C. Pa. 425; *Dempsey v. Caspar* (1854), 1 Ont. Pr. 180.

⁷¹ *Gilliam v. Tobias* (1875), 11 Phila. Pa. 313.

⁷² *Brown v. Ruttan* (1850), 7 Upper Canada Q. B. p. 99.

him a title to the goods, if it is shown in the issue that he had no title at the time of the seizure.⁷²

Where a claimant deposited the value of the goods to abide the issue, but failed to establish his claim, and the money was paid out to the execution creditor in part satisfaction, it was held that the creditor was not entitled to seize the goods a second time, for by taking the money out of court, he had estopped himself from thereafter disputing, that as against himself the claimant was the owner.⁷⁴ But the goods remain subject to seizure under the execution of another creditor, and when seized, and another interpleader application is made, the claimant will be ordered to pay into court a second time, the value of the goods to abide the result of the second issue.⁷⁵

Pending the trial of an interpleader issue the execution creditor has no right to the immediate return of the writ. Any return which the sheriff could make would be of no use to the execution plaintiff.⁷⁶ Under an order, the claimant paid £20 into court, and the sheriff withdrew from possession. It appearing, that the plaintiff's execution was for £446, it was held that the interpleader proceedings did not operate as a stay of execution as to the whole debt.⁷⁷

But, where goods are taken in execution, sufficient to answer the judgment, and are claimed by a third party before the sheriff has made a return, although he may have seized and sold, and an interpleader summons has been taken out and is pending, the judgment creditor is not in a position to issue another execution for the amount of his judgment debt, nor is he entitled to serve a bankruptcy notice on the judgment debtor.⁷⁸

⁷² *Haddow v. Morton* (1894), 1 Q. B. 95 & 565; 9 Reports 205; *Kotchie v. The Golden Sovereigns* (1898) 2 Q. B. 164.

⁷³ *Haddow v. Morton* (1894), 1 Q. B. 95 & 565.

⁷⁴ *Kotchie v. The Golden Sovereigns* (1898), 2 Q. B. 164.

⁷⁵ *Ex parte Ford* (1886), 18 Q. B. D. 369; *Angell v. Baddeley* (1877), 3 Ex. D. 49. See ante p. 200.

⁷⁶ *Re Bates* (1887), 57 L. T. 417.

⁷⁷ *In re Follows* (1895), 2 Q. B. 521.

If bond becomes worthless.—When the claimant takes the goods upon giving security, and they afterwards disappear, and before the issue is tried the claimant and his sureties become insolvent, it has been held on appeal in Ontario, that the claimant cannot be obliged to furnish fresh security as a condition of being allowed to prosecute his claim. The security has nothing to do with the determination of the rights, but with an entirely different matter, namely, the preservation of the property pending the litigation. Upon a further appeal, the Ontario Court of Appeal was equally divided, but agreed that if the goods were still in the possession of the claimant, the sheriff might be ordered to take them.⁷⁰

When goods disappear.—When a sheriff is directed to withdraw in favour of the claimant, and the execution creditor upon appeal shows that such order is wrong, and that an issue should have been directed, and the goods have in the meantime disappeared, the court will order the parties to try an issue, if they can agree upon one, to settle the question of costs, or if they cannot agree upon an issue, will leave it open for the execution creditor to seize again.⁷¹

The applicant's costs and charges.—As will be seen in the chapter on costs, the applicant has a lien on the subject matter for his costs and charges. If he sells under the order of the court, he deducts these before paying the proceeds into court. If a claimant is to have the goods upon giving security, he must first pay these costs and charges to the applicant, before the goods pass out of the latter's possession.⁷²

In sheriff's cases, the usual practice gives the sheriff a lien only for his possession expenses from the date of the order. These are his actual disbursements in carrying out the direction of the court, and the subsequent success of the claimant will not justify an order upon the sheriff to refund these expenses to the claimant, if the latter succeeds he

⁷⁰ *Hogaboom v. Gillies* (1894), 18 Ont. Pr. 96 & 260.

⁷¹ *Rondot v. Monetary Times* (1899), 19 Ont. Pr. 23.

⁷² See Chapter XIII.

can recover them from the execution creditor in a summary way, as one of the questions reserved to be ultimately disposed of.⁵²

When the claimants settle.—The court will order the money brought in, to be paid to a person having authority from all the claimants to receive it, as to an attorney or solicitor acting for them all.⁵³ After an order is made, if the solicitors for the claimant and the execution creditor vary its terms, a sheriff is justified in acting upon their instructions, and may pay over part of the subject matter to one of the parties.⁵⁴

When one claimant abandons.—It has been said, that if one claimant abandon, or his interest otherwise cease, the other cannot take the goods as a matter of course without showing some title to them. Thus, where an execution creditor abandoned, after an order had been made and a bond filed by the claimant, it was held, that before the claimant could have possession he must give proof of his title, and that the mere fact that he had given a bond was not sufficient to enable him to recover.⁵⁵ So, when one claimant dies, the other cannot have the fund merely because he is the only claimant left, he must give proof.⁵⁶ And if the execution debt becomes satisfied under other process, after an interpleader order has been made, the order will not be vacated, if there be unsatisfied wages claims filed, the wages claimants having a right to continue the issue.⁵⁷ If one claimant fail to appear, payment to the other will be conditional upon the claimant indemnifying the applicant, if the document under which the money is claimed is not forthcoming.⁵⁸

⁵² *Reid v. Murphy* (1887), 12 Ont. Pr. 338; *Appelby v. Withall* (1880), 8 Upper Canada C. P. 397; *Centra Ontario Bank v. Revell* (1886), 11 Ont. Pr. 249.

⁵³ *Powell v. Sonnet* (1826), 3 Russ. 550.

⁵⁴ *Hackett v. Bible* (1888), 24 Upper Canada L. J. 250.

⁵⁵ *Passavant v. Gummey* (1801), 32 W. N. C. Pa. 217.

⁵⁶ *Pillow v. Aldridge* (1843), 4 Hump. Ten. 287.

⁵⁷ *Riley v. Kolling*, 7 O. C. Pa. 193.

⁵⁸ *M'Eiheran v. London* (1886), 11 Ont. Pr. 181; see also *Knight v. Yarborough* (1846), 7 S. & M. (Misc.) 179.

Sheriff always entitled to an order.—Where an interpleader order directed a sheriff to withdraw, upon being paid a certain sum by the claimant, and that the sum should abide the order of the court, and that no action should be brought against the sheriff; before any further step was taken the execution creditor gave up his claim, and an order was made declaring that the goods were the goods of the claimant. It was held, that such an order was not equivalent to an order for payment of the money by the sheriff. He is entitled to a specific order to pay the money out. Where an issue is settled before trial, there still remains the administrative process, to the carrying out of which the determination of the issue is a preliminary step, and the sheriff still holds the money under the order of the court, until an order shall direct him how he is to dispose of it. If the matter were otherwise, the sheriff would be placed in a position of great difficulty, in having to determine whether the parties had agreed on the matter, and whether such proceedings taken behind his back, had concluded it. No such duty is cast on him, and he is entitled to wait until he gets an order which relieves him from all responsibility.⁹⁰

Right of successful claimant.—Upon the determination of the issue the successful party is entitled to the subject matter which was in dispute.⁹⁰ If money has been paid into court, the prevailing party cannot take it out before judgment has been signed.⁹¹ Under the English practice, the court or judge who tries the issue may make an order for payment out or delivery over to the successful claimant.⁹²

Where a claimant, in a sheriff's case, claimed all the goods seized, and paid into court the amount of the execution, and it turned out at the trial that the larger part belonged to him, and the balance not to the debtor, but to

⁹⁰ *Discount Banking Coy. of England v. Lambarde* (1893), 2 Q. B. 329.

⁹¹ *Johnson v. Maxey* (1860), 43 Ala. 521; *McElroy v. Baer* (1880), 13 Daly N. Y. 442.

⁹² *Cooper v. Lead Smelting Co.* (1833), 1 Dowl 728.

⁹³ Eng. Order LVII. r. 13; Ont. Rule 1114; for the former practice see *Marks v. Ridgway* (1847), 1 Wels. H. & G. 8.

other parties, the claimant was held entitled to a verdict, and to have all the money paid out of court to him.⁸⁸

When the issue, in a sheriff's interpleader, is ended by a judgment against the execution creditor, and a declaration that the property belongs to the claimant, the sheriff is bound to deliver it, if still in his possession, to the claimant; and, if, as between the claimant and the execution debtor, the latter is entitled to possession, he must sue the claimant if he desires the property.⁸⁹

If an execution creditor abandon the issue, in Pennsylvania, the sheriff remains in possession for 48 hours, so that the claimant may take proceedings to recover.⁹⁰

When an execution creditor.—After judgment in favour of an execution creditor, whether obtained by default or otherwise, the sheriff proceeds to sell the goods, when they are still in his possession, or when they come back to him under a forthcoming bond.⁹¹ He may sell, although the goods have passed into the hands of a vendee of the claimant.⁹² In New South Wales, it has been said to be doubtful, whether it is necessary that an order should be obtained directing the sheriff to sell, although such is the practice there.⁹³

Satisfaction of bond.—The exigencies of a forthcoming bond are satisfied by the production of the same goods as were claimed,⁹⁴ although some of them may be depreciated, if without the fault of the claimant,¹ but the bond will be broken, if all are not forthcoming.² A claimant who is nonsuited, for failure to appear at the trial, must produce the goods or his bond will be broken.³ It is no defence to an action on the bond, that the claimant has been obliged to

⁸⁸ *Plummer v. Price* (1879), 39 L. T. N. S. 657.

⁸⁹ *Commonwealth v. Walter* (1900), 195 Pa. St. 446.

⁹⁰ Pa. P. L. No. 80 of 1897.

⁹¹ *Caven v. Cole* (1878), 35 L. I. Pa. 402; *Menge v. Wiley* (1882), 100 Penn. St. 617; *Conley v. Gartner*, 8 Lanc. Pa. 20.

⁹² *Bain v. Lyle* (1871), 68 Penn. St. 60.

⁹³ *Burns v. Dalsell* (1887), 4 N. S. Wales W. N. 81.

⁹⁴ *Whitesides v. Bordman* (1882), 29 L. I. Pa. 347.

¹ *Bain v. Lyle* (1871), 68 Penn. St. 60.

² *Hill v. Robinson* (1883), 44 Penn. St. 380.

³ *Brenzier v. Cahill* (1877), 6 W. N. O. Pa. 147.

deliver the goods to the debtor's assignee in bankruptcy, nor that the claimant arranged that the goods should be sold and the proceeds stand in their place, as that merely fixes the amount of the damages.⁴ Nor is it a defence, that when the issue came on for trial the parties agreed to withdraw a juror.⁵ The measure of damages is the value of the goods which should have been forthcoming, and not the amount of the execution.⁶

If a money bond has been given, the successful claimant will not concern himself about the goods, but will take the bond out of court and institute proceedings upon it.

Where the goods of a debtor were seized under several executions, and the debtor subsequently becoming bankrupt, and his assignee claiming the goods, an interpleader order was made, under which the goods were sold and the proceeds paid into court to abide the event of the issue. In the result, four of the executions which stood first in order of priority were set aside. It was held, that the right of the assignee to the proceeds paid into court was subservient to that of the subsequent execution creditors, whose judgments had not been impeached.⁷

Claimants who participate.—Of the claimants brought before the court, only those can share in the subject matter who take part in the contest and are successful. A claimant who does not take an issue, cannot afterwards participate in the fund with the execution creditors who have successfully contested the claim.⁸

Execution creditors in Ontario.—In Ontario, where all execution creditors placing writs in a sheriff's hands up to within thirty days after a sale, share equally in the proceeds, it is specially provided, that the court may exclude any creditor who refuses to join in contesting the adverse claim, from any benefit to be derived from the contest; and that only those creditors joining and agreeing to contribute

⁴ *Davis v. Fouche* (1881), 38 L. J. Pa. 186.

⁵ *Williams v. Gray* (1850), 19 L. J. C. P. 382.

⁶ *Bryne v. Hayden* (1880), 28 W. N. C. Pa. 308.

⁷ *Goldschmidt v. Hamlet* (1848), 6 Scott N. R. 982.

⁸ *Martin v. Lofland* (1848), 10 Smed. & M. Miss. 317.

to the expense of contesting the adverse claim shall be entitled to share in the benefit. An adverse claim being defined as a claim to contest which an interpleader issue is directed. Upon the determination of the issue, if the claimant fails, the moneys are divided by the sheriff among the creditors who joined in the contest.⁹

When each claimant has an interest.—The court will distribute the fund so as to do complete equity between the claimants, and having the fund under its control may fasten upon it, either in whole or in part, any equitable lien or trust which one of the parties may have established, though the legal title is in the other. The court is not bound to award it wholly to him who has the legal title, but may so shape its decree, and distribute the fund as to work complete justice between the claimants.¹⁰ Although the court may disapprove of the means by which the fund has been accumulated, it must dispose of it, and, in doing so, will require an honourable settlement between the claimants.¹¹

Neither claimant entitled.—It may sometimes appear, upon the trial, that neither of the claimants is entitled, in which case the matter may be remanded until the rightful party is brought in.¹²

Time for distribution.—The court will not allow one claimant, who has established his claim to a part of the fund, to have payment out until, the whole matter can come up on further directions, unless it is quite clear, that no part of what is so claimed will be required for costs.¹³

Interpleader refused.—If money has been paid into court, and in the end relief by way of interpleader is refused, the

⁹ Ont. Rule 1113; R. S. Ont. (1897), c. 73, s. 4. For decisions before 1893 and which are not now applicable see: *Levy v. Davies* (1886), 12 Ont. Pr. 93; *Reid v. Gowans* (1886), 13 Ont. App. 50; *Bank of Hamilton v. Durrell* (1888), 15 Ont. App. 500; *Wait v. Sager* (1891), 14 Ont. Pr. 347.

¹⁰ *Whitney v. Cowan* (1878), 55 Miss. 626.

¹¹ *Gilmore v. Develin* (1880), 4 Mac A. D. C. 303.

¹² *Keener v. Grand Lodge A. O. U. W.* (1889), 38 Mo. App. 543.

¹³ *Bruce v. Elwin* (1851), 9 Hare 294.

applicant is entitled to have the fund returned to him without any deduction of costs.¹⁴ If a sheriff's application be discharged, he will still have the goods levied upon to be disposed of under the best advice he can obtain.¹⁵

If applicant withhold goods.—After an issue has been decided in a claimant's favour, if a sheriff improperly withhold goods, he will give a new cause of action against himself. Where a sheriff was unable to sell goods under the interpleader order, and they remained in his hands until after the issue had been decided, it was held no part of his duty, without tender of his costs of so doing, to restore the goods to the custody of the claimant, in the same state as they were at the time of seizure.¹⁶

Pending an appeal.—Pending any appeal which the unsuccessful claimant is entitled to bring, money in court will not be paid out, nor the subject matter of the litigation handed over to the so far successful claimant. As the subject matter stands to abide further order, payment or delivery is discretionary, and will not be made pending an appeal.¹⁷ But it may be, upon the condition, that the appellant give security for the difference between the legal rate of interest and that allowed by the court.¹⁸

An appellant, however, invoking the discretion of the court must prosecute his appeal with reasonable diligence.¹⁹ Where an appellant had obtained a stay of proceedings upon giving security, but was dilatory in bringing his appeal on, the claimant was granted an order with costs rescinding the former order, and directing the fund to be paid out to him.²⁰

¹⁴ *M'Kiernan v. Kernan* (1845), 8 Ir. Eq. R. 145; *Doyle v. Dumoncel* (1847), 11 Ir. Eq. R. 342 & 517. But see ante p. 71.

¹⁵ See *Gray v. Krugerman*, 4 C. C. Pa. 290.

¹⁶ *McCollum v. Kerr* (1862), 8 Upper Canada L. J. O. S. 71.

¹⁷ *King v. Birch* (1845), 7 Q. B. 669; *Robinson v. Tucker* (1864), 14 Q. B. D. p. 374; *King v. Duncan* (1881), 9 Ont. Pr. 61; *McElroy v. Baer* (1886), 13 Daly N. Y. 442.

¹⁸ *McDonald v. Worthington* (1881), 8 Ont. Pr. 554.

¹⁹ *Greene v. Letterkenny* (1868), 8 Ir. R. C. L. 160.

²⁰ *McMaster v. Coventry*, Ont. Ct. of Appeal, Feby., 1894, *MacLennan, J.A.*, unreported.

The usual form of interpleader bond is conditioned, that the claimant will pay, etc., if, upon the trial or other determination of the issue, the verdict or other determination is against him. An appeal being a step in the original cause or matter, it would seem that the interpleader bond, or subject matter, should remain in court until the last appeal or final end of the litigation.²¹

Where an order had been made for payment out of court to a claimant, the court refused to stay the order, although a creditor's suit was pending against the claimant in which an injunction had been granted, but had not been served on the officer of the court.²²

When wife claims as doweress.—Upon the trial of an interpleader issue, it appeared that a married woman claimed the goods as security for any loss she might sustain by reason of barring her dower. Having succeeded at the trial, and her husband being alive, the money was ordered to remain in court, to be paid to her if she survived her husband.²³

²¹ *Napier v. Hughes* (1882), 9 Ont. Pr. 164; *National Ins. Coy. v. Rolson* (1884), 9 Ont. Pr. 202.

²² *Smith v. Clinch* (1842), 2 Dowd N. S. 48. See also *Wilson v. Wilson* (1878), 7 Ont. Pr. 407.

²³ *Morris v. Martin* (1890), 26 Upper Canada L. J. 413.

CHAPTER X.

IS AN INTERPLEADER PROCEEDING AN ACTION?

What is an interpleader proceeding?—The question has often been asked in statutory interpleader—Is an interpleader proceeding “an action” or “a proceeding in an action?”—but the judicial deliverances upon this apparently simple matter are many and conflicting. Closely related is the further question, which applies to interpleader generally—Is the order or judgment which is made in interpleader to be regarded as final or interlocutory?—and the decisions upon this are also in some degree confusing.

Chronological list of decisions.—The following paragraphs contain in chronological order the views which have been expressed by the Courts upon the above questions and upon some kindred matters.

In 1823 in New York—The decree obtained by the plaintiff upon a bill of interpleader is looked upon as final, so far as he is concerned, and not interlocutory.¹

In 1841 in England—A feigned issue cannot be considered as within the term “action:” the Interpleader Act speaks of an issue and an action as two different things.²

In 1845 in England—In effect, the feigned issue and the judgment thereon, is no more than an interlocutory proceeding in another suit, in the nature of an interlocutory judgment, wherein the court is subsequently to act in dispensing the rights of the parties. It was held, therefore, that a writ of error would not lie from the trial of an interpleader issue.³

¹ *Atkinson v. Manks* (1823), 1 Cow. N. Y. 601.

² *Lott v. Melville* (1841), 9 Dowl. 822.

³ *King v. Simmonds* (1845), 7 Q. B. at p. 311.

In 1859 in England—The language, "upon the trial of any cause," applies to an interpleader cause. The mischief to be remedied is just as great, for most important rights may be decided in an interpleader cause. "Upon the trial of any cause" is upon the trial of any cause which can come legitimately before a court. It was decided, therefore, in a sheriff's case, that an appeal lay from the trial of an interpleader issue.⁴

In 1860 in Upper Canada—Following the practice in England, an appeal lies from the judgment of an interpleader issue, as the term "cause" covers an interpleader cause.⁵

In 1862 in England—Erle, C.J., said:—"I do not see why the word 'cause' should not embrace an interpleader issue. The importance of learning the truth is just as great, in an interpleader, as in any other cause. There are two parties, and there is a matter in dispute. It was therefore held that interrogatories might be delivered in an interpleader issue."⁶

In 1864 in Upper Canada—Though possessing many of the characteristics of an action, an interpleader proceeding is not strictly a suit in the eye of the law. It was decided, therefore, that an order to rescind the issue must be made in the original cause.⁷

In 1872 in Maryland—A decree passed upon a bill of interpleader, before answers are filed, requiring the fund to be paid into court, and enjoining the defendants from further proceedings and requiring them to interplead, is interlocutory and settles the right of no party, and is at all times, before a final decree, subject to revision and alteration, being merely ancillary to further proceedings.⁸

In 1873 in Ohio—It was not intended by the substitution of a third party for the defendant interpleading, to

⁴ *Withers v. Parker* (1859), 4 H. & N. p. 814, Erle, J.

⁵ *Wilson v. Kerr* (1860), 18 U. C. Q. B. 470; *Feehan v. Bank of Toronto* (1860), 10 U. C. C. P. 32.

⁶ *White v. Watts* (1862), 12 C. B. N. S. p. 271.

⁷ *Salter v. McLeod* (1864), 10 U. C. L. J. O. S. 299.

⁸ *Barth v. Rosenfeld* (1872), 36 Md. 604; followed in *Heald v. Rhind* (1897), 86 Md. 320.

change the nature of the case from a civil action to a statutory special proceeding, and thereby to deprive the parties of the rights incident to a trial in a civil action. The action remains though the parties be changed. The issues to be tried, remain essentially the same, as they would have been had there been no change of parties to the record, and the plaintiff cannot be deprived by the change of defendants of the rights of a party to a civil action, merely because he is forced to contend with a new and perhaps more formidable antagonist.⁹

In 1874 in Ontario—An interpleader proceeding is a proceeding which comes within the meaning of the words "an action at law," and therefore a party to an issue may be examined for discovery.¹⁰

In 1877 in England—A judgment on the trial of an issue is an interlocutory one. Rule 2 of Order I. provides, with respect to interpleader, that the procedure and practice now used by courts of common law, under the Interpleader Act, shall apply to all actions and all the divisions of the High Court, and the application by a defendant shall be made at any time after being served with a writ of summons, and before delivering a defence. Under the Interpleader Act, the process of interpleader may be carried out, either by making the claimant defendant in the action in which the application for an interpleader order is made, or in some other action, or by the more common process of a feigned issue. If the last mode is adopted, the interpleader issue becomes a process ancillary to the original action, which is still kept alive for the purpose of enabling the judge seized of the matter, after judgment has been given upon the interpleader issue, to finally adjust the rights of all parties, and to settle all outstanding questions of costs. Although it is true that interpleader issues partake in some measure of the character of actions, and that the findings upon them do substantially determine the questions between the parties to such issues, yet still they are not, strictly

⁹ *Maginnis v. Schwab* (1873), 24 Ohio St. 342.

¹⁰ *Canada Permanent L. & S. Co. v. Forest* (1874), 6 Ont. Pr. 254.

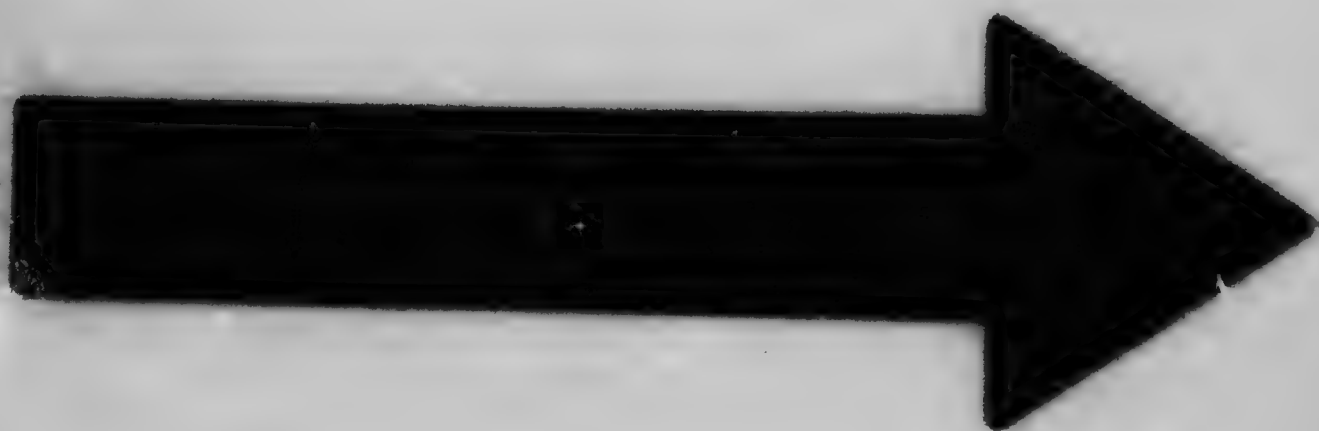
speaking, actions, but are more analogous to inquiries directed in the course of actions. It is to be observed, that it is only by the final order made in the action, out of which the interpleader springs, that the directions necessary to terminate all the questions, even between the parties to the issue, are finally given. The determination upon the issue is a condition precedent to the final determination of the action, and that fact demonstrates the inconvenience and delay which would result from its being held, that the order determining the issue is a final order, entitling the successful party to it to delay any appeal, and thus staying the hands of the court at first instance, as regards the original action, or putting the parties to the expense of a final order in the action, which would require to be set aside, if the order upon the interpleader issue turned out to be wrong.¹¹ Two actions had been brought relating to a cargo, and an interpleader issue directed to try the question to whom it belonged. The issue having been tried, the question was, whether the judgment should be appealed from as a final or as an interlocutory judgment.

In 1878 in Ontario—The proceeding, a sheriff's interpleader, is not a step in the original suit in which the *fi. fa.* issued, though it arises from what has been done under the writ of execution issued in that cause. The claimant of the goods is not a party to that suit, neither is the sheriff. They are merely parties to the collateral proceeding authorized by the statute for the protection of the sheriff.¹²

In 1880 in England—Interpleader is not an action, either in the strict or in any conventional sense. Under the Judicature Act, an action is a civil proceeding, commenced by writ, or in such other manner as may be presented by Rules of Court. There is no rule of court prescribing the commencement of interpleader proceedings in any other manner. On the contrary, interpleader is treated by Order I., Rule 2, as a proceeding in an action, and so it

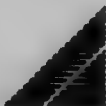
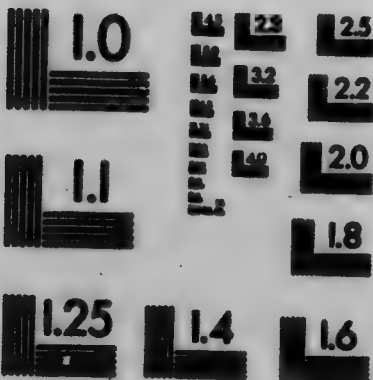
¹¹ *McAndrew v. Barker* (1877), 7 Ch. D. 701.

¹² *Wilson v. Wilson* (1878), 3 Ont. App. 400.



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was held, that a notice for trial without a jury could not be given under rules which only mentioned actions.¹³ Interpleader in England is now regulated by rules of court and not by a statute as in 1880.

In 1880 in Ireland—An order disposing of a sheriff's interpleader, and directing the execution creditor, who did not appear, to pay the costs, is not equivalent to a judgment in an action.¹⁴

In 1881 in England—The Court of Appeal in considering whether costs incurred in the action in which an execution issued, should be set off against costs in the interpleading proceeding which followed, as being costs of the same proceeding, decided that they could not, because, it was said, an interpleader is a proceeding as distinct from the action as possible. The proceeding is certainly entitled in the action, but that is only a convenient mode of identifying it; it would be more correct to entitle it in the matter of the execution.¹⁵

In 1883 in Ontario—Interpleader is not an action, but a proceeding in an action.¹⁶

In 1883 in England—Under the old practice, the judge on the trial of an issue only gave interlocutory judgment, which was afterwards settled at chambers; now it is unnecessary to go to chambers, and the presiding judge gives final judgment.¹⁷

In 1884 in Manitoba—An interpleader is not a cause, and is never spoken of as such, and so does not come within the rule, that when a cause is at issue the defendant may give notice of trial.¹⁸ An order cannot be made for the examination of a defendant in an interpleader issue, because the general rule is not wide enough in its terms to cover the issue and the parties to it.¹⁹

¹³ *Hamlyn v. Betteley* (1880), 6 Q. B. D. p. 66.

¹⁴ *Booth v. Egan* (1880), 6 Ir. R. C. L. 252.

¹⁵ *Barker v. Hemming* (1881), 48 L. T. S. S. 678.

¹⁶ *Coulson v. Spiers* (1883), 9 Ont. Pr. 492.

¹⁷ *Burstell v. Bryant* (1883), 12 Q. B. D. p. 104.

¹⁸ *Plaxton v. Monkman* (1884), 1 Man. 371.

¹⁹ *McMillan v. Bartlett* (1884), 2 Man. 62.

In 1885 in England—The English Judicature Act of 1873 gives every inferior court jurisdiction to grant certain relief and remedies in proceedings before such court. It has been held that this power refers only to the relief and remedies to be administered in the action, and as the result of the action, and not to an incidental and extraneous proceeding arising out of the levy of an execution, such as a sheriff's interpleader.²⁰

In 1885 in Manitoba—A claimant in an interpleader issue is not a party to a cause, within an Act which allows an appeal.²¹ Where a statute enacts that no chattel mortgage can be declared void, as giving the holder a preference or priority, except by a bill in equity for the benefit of the plaintiff, it has been held that a chattel mortgage cannot be declared void upon an interpleader issue.²²

In 1886 in England—Upon an appeal to the Court of Appeal, from an order of a Divisional Court, dismissing an appeal from the finding of the judge who tried an interpleader issue transferred to a County Court, it was contended that the order made by the Divisional Court upon the first appeal was an interlocutory order, and that notice of appeal had not been given properly, the court overruled the objection and held that the order was a final order.²³

In 1887 in England—An interpleader proceeding is not within the term "action" in a statute which provides that with the leave of the judge an appeal shall lie in certain actions.²⁴

In 1887 in Pennsylvania—An issue under the Sheriff's Interpleader Act is not within a statute which provides, that it shall be lawful for either party in any civil suit or action to choose arbitrators for the trial of matters in variance.²⁵

²⁰ *Speers v. Daggers* (1885), 1 Cababé & Ellis, 503.

²¹ *Long v. McDougall* (1885), 3 Man. 685.

²² *McMillan v. Bartlett* (1885), 2 Man. 374.

²³ *Hughes v. Little* (1886), 18 Q. B. D. 32.

²⁴ *Collis v. Lewis* (1887), 20 Q. B. D. 202.

²⁵ *VanAuken v. Buxton* (1887), 1 Mona. Pa. 390.

In 1887 in Canada—The finding and judgment upon the trial of the issue is a judicial determination upon the merits of the matter in contestation, as much as a like judgment upon matters in contestation between plaintiffs and defendants in an action. The necessity of obtaining a final order in the original suit, can have no effect whatever in making the adjudication upon the merits in the issue a whit more final than it already is. The judgment upon an issue tried, on the application of a sheriff for protection from claims made to property seized in execution, and determining conclusively, until reversed by some court of competent jurisdiction, the rights of the execution creditor to the fruits of the seizure, as against the claimant, is of a different character from a judgment on an interpleader issue ordered in the progress of a suit, for the purpose of determining a point necessary to be determined before judgment can be pronounced in the suit, during the progress of which the interpleader has been ordered. The words "judgment in a cause or matter depending in any court" are abundantly sufficient to include, and must be construed to include an interpleader issue and the matter in contestation therein.²⁸

In 1887 in England—Proceedings in interpleader are substantially a second action. The fact that proceedings in interpleader are a second litigation is not disposed of by suggesting, that for some technical purposes they are regarded as part of the original action. Names are nothing. Interpleader at the instance of the sheriff is not a natural consequence of a judgment in favour of the plaintiff in an action. It is another proceeding, and it rests with the plaintiff to say whether he will, or will not, become a party to the new issue. The only authority which the industry of counsel has discovered, to the contrary, is the dictum of Lord Selborne in 1880, to the effect that interpleader is not an action but a proceeding in an action. This dictum refers not to the present question, but to the forms of pro-

²⁸ *Hovey v. Whiting* (1887), Canada 14 S. C. R. p. 524 *et seq.*

cedure under the Interpleader Act.²⁷ The point turning on this was, that a solicitor, under an ordinary retainer, has no authority without special instruction to engage in proceedings in interpleader.

In 1888 in Manitoba—An interpleader issue is within the term "action,"²⁸ and may be entered for trial on a Tuesday.

In 1888 in Ontario—Proceedings in interpleader are substantially a second action, and a solicitor retained to collect a debt is not entitled to interplead, without a further retainer for that purpose.²⁹

In 1891 in England—The judgment upon the trial of an interpleader issue is really in the nature of an interlocutory decision; it is not a final judgment. It is a judgment upon a proceeding which is itself in the nature of an interlocutory proceeding. The interpleader proceeding may be an action within the meaning of the rules. There is no substantial change in the old law. Under the old law, the judge tried the issue which had been directed at chambers, that is, it was only a step in the regulation of the entire rights of the parties, and the complete adjustment of the rights took place in chambers after the issue had been tried. But there was obviously an inconvenience in having to go back again to chambers, when the judge had at the trial of the issue all the parties before him, or could easily have got them before him, and certainly could better adjust the rights with knowledge of all the circumstances, than a judge at chambers hearing that part of the case afterwards, and for that purpose the rules of court wisely prescribe that the judge who tries the issue shall be clothed with the power, if he choose, of finally adjusting all the rights of the parties, instead of the judge at chambers. It confers upon the judge sitting to try the issue, all the authority and all the functions of a judge sitting in chambers.³⁰

²⁷ *James v. Ricknell* (1887), 20 Q. B. D. pp. 166 and 167.

²⁸ *Douglas v. Burnham* (1888), 5 Man. 261.

²⁹ *Hackett v. Bible* (1888), 12 Ont. Pr. 482.

³⁰ *MacNair v. Audenshaw* (1891), 2 Q. B. 502.

In 1892 in Manitoba—A rule which empowers a judge sitting at *nisi prius* "at all times to amend all defects and errors in any proceedings in civil cases" is wide enough to embrace an interpleader issue.²¹

In 1893 in Ontario—Where it appeared that the original action in which execution issued was in one county, and the interpleader proceedings in another, it was held that the local judge of the first county had jurisdiction to make an order for the examination of one of the parties to the issue, because the interpleader application was a step in the first action.²²

In 1893 in England—Under a rule which gave a district registrar, when a cause or matter was proceeding in his district, all such authority and jurisdiction as might be exercised by a judge at chambers, it was held that the district registrar had no jurisdiction to make an interpleader order, but that such application must be made to the master in London.²³

In 1895 in Ontario—An interpleader proceeding is not an action, and a rule which enables the court to order an action to be discontinued upon terms as to costs, does not apply to interpleader issues.²⁴

In 1897 in Ontario—With the object of making the matter clear, in the face of so many conflicting authorities, a rule having the force of a statute was adopted in Ontario in 1897 which provides, that "action," as defined by the Judicature Act, shall include proceedings for relief by interpleader.²⁵

In 1898 in Ontario—An order made on a sheriff's application directing an issue, if the claimant should give security, and otherwise directing that the goods be sold and the proceeds paid to the execution creditor, is not in its nature final but merely interlocutory.²⁶

²¹ *Fisher v. Brock* (1892), 8 Man. 137.

²² *Calder v. McLay*, Ont., 23rd January, 1893, unreported.

²³ *Hood v. Yates* (1893), W. N. 190.

²⁴ *Hogaboom v. Gillies* (1895), 16 Ont. Pr. 402.

²⁵ Rules of 1897, sec. 6 (e).

²⁶ *Hunter v. Hunter* (1898), 18 Can. L. T. 114.

In 1901 in England.—An interpleader proceeding is within the words of a statute which gives the court jurisdiction to award costs "in any action or proceeding instituted by a married woman," etc.⁴

Decisions not reconcilable.—It is not possible to reconcile all these conflicting decisions, and it might be presumption on the part of the author to attempt to extract from them rules, which should be followed under all circumstances. It was, at his suggestion, and to end such diversity, that the Ontario statutory rule was passed which enacts that "action" shall include proceedings for relief by interpleader. This consideration of the practice in interpleader is important, and some further remarks upon it may be permissible, as it has not as yet been comprehensively dealt with in any reported decision.

Form of interpleader proceedings.—The terms "interpleader proceedings" and "interpleader proceeding" are somewhat ambiguous. They may mean the whole proceeding, or some part of it. There are always two distinct parts to each interpleader litigation. First, the triangular context in which the stakeholder comes into court in company with the two adverse claimants, either by bill of interpleader, or in an action of interpleader, or in statutory interpleader in a more summary and simple way by summons, petition, or motion; and, secondly, the litigation which follows, between the claimants alone, generally taking the form of an issue or an action.⁵

Force and effect of remedy.—An interpleader proceeding, though simple and summary, is, when examined, of considerable force and wide effect. Take the case of a stakeholder who has been sued by both claimants; he comes into court, and in an expeditious manner, without the usual preparatory steps of an ordinary suit, and generally without a trial, obtains an injunction which stays both actions so far as they concern him, dismisses him out of court with

⁴ *Nunn v. Tyson* (1901), 17 Times L. R. 624.

⁵ See *Temple v. Temple* (1894), 10 R. 269.

his costs, and directs the two claimants to proceed in a litigation not of their own choosing. A proceeding which is allowed to accomplish so much, with such simple legal machinery, should not be lightly regarded. The substance should be looked at rather than the form. If it is of equal strength to an action, it should be so viewed, and should receive a liberal rather than a technical construction.

Why it should be looked on as an action.—As interpleader is sometimes designated an extraordinary remedy, and is, besides, special in its character; it follows naturally that it has not under any system of judicature a full code of procedure of its own, which will permit all the steps usually taken by the parties preliminary to a trial in a modern action. It becomes of importance, therefore, to be able to say that an interpleader proceeding, in any or all of its several forms, is equivalent to an action or suit, because all the procedure relating to actions or suits generally then applies when necessary to issues as well. The parties in interpleader will then have the same advantages in getting ready for a trial or hearing, as have other suitors, while the dissatisfied claimant will have the customary opportunity of reviewing the decision at the trial before a higher court. The fact that it is optional with the court to say whether the claimants shall continue their litigation in a proceeding designated an interpleader issue, or in an action as ordinarily understood, makes it reasonable to suggest that the parties should have equal facilities in either form of proceeding. It is scarcely fair, that a plaintiff in an issue should possibly be deprived of the right to production, or discovery, or a jury, or discontinuance, or appeal, as the case may be, when all these come as a matter of right to another claimant, who, fortunately for him, is to maintain his rights as plaintiff in an action.

Action, cause, and suit.—The terms "action," "cause," and "suit," apart from any special statutory definition, seem broad enough to cover the form and matter which are found in interpleader litigation. As the tendency in modern times is to give the remedy a broad and liberal construc-

tion in favour of the party requiring relief,³⁸ it seems reasonable that an interpleader proceeding should always be given the importance and weight which it deserves, even when a question at issue is between the two claimants, rather than that it should be looked upon as something less important than a suit or action. All technical questions and objections should as far as possible be brushed aside.

Narrow view in England.—The tendency in England has been to regard the issue between the claimants in a narrow way, rather as a derivative proceeding, than as an original one, and to designate it as a proceeding in an action, and not as equivalent in substance to an action.

Correct view in England.—Notwithstanding the decisions to the contrary in England and Canada, it is submitted that an interpleader proceeding is within the term "action," when that word is defined by statute to mean,— "a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of court." An interpleader proceeding is clearly a civil proceeding which is commenced as prescribed by a rule of court.³⁹

View in the United States.—In the United States a broader view is taken. When the claimants are compelled to contest between themselves, as the result of the stakeholder's act in seeking deliverance from their threatened actions, they stand before the court to litigate the question between them, to the same extent as if one had filed a bill against the other, they occupy the positions of plaintiff and defendant;⁴⁰ and when an action against the stakeholder is continued, with the outside claimant substituted as defendant, the litigation does not change from a civil action to a special statutory proceeding, and the parties are not deprived of the rights incident to a trial in a civil action.⁴¹

³⁸ See ante page 3.

³⁹ See *Re Fawcitt* (1885), 30 Ch. D. 231; *Re Vardon* (1885), 31 Ch. D. 275; *Re Wallis* (1888), 23 L. R. Ir. 7. Contra, *McAndrew v. Barker* (1877), 7 Ch. D. 701, decided before interpleader was governed by Rules.

⁴⁰ See ante page 174.

⁴¹ *Maginnis v. Schwab* (1873), 24 Ohio St. 342.

When not in an action.—It is of course clear, that an interpleader cannot be a proceeding in an action, so far as the applicant is concerned, when no action has been brought by either claimant before the interpleader is launched. It is hardly logical to say that it is, even when an action does exist. It is more correct to say, that it arises by reason of the action having been commenced, or that it is entitled in the action.

Example from sheriff's case.—In the case of a sheriff under the English practice, he comes into court as a new party himself, bringing in a second new party in the person of the claimant, while the subject-matter, the goods seized, are also entirely new. The only remnant of the action in which the execution issued, is the successful party there, who now comes in under a new name, as the execution creditor. Can it be said, with any consistency, that the sheriff's application is a proceeding in the action? If it can, what will the answer be, where a sheriff has seized under two different executions, and has entitled his proceeding in both? Which action is it a proceeding in? A sheriff's application is substantially a new and original proceeding, no matter what its form.

Judgment, final or interlocutory.—It is also impossible to extract from the above decisions, a rule, which shall say, whether the order or judgment in some part of interpleader proceedings is in each particular case final or interlocutory. The judgment or order which is obtained by the person seeking relief is clearly final, so far as he is concerned; it gives him his remedy and sends him out of court for good. But the same judgment or order may be interlocutory, so far as the claimants are concerned, as it merely puts them in motion to have their rights decided in an action or issue.⁴²

⁴² See further Chapter XIV.

CHAPTER XI.

INTERPLEADER AS AFFECTED BY BANKRUPTCY.

Interpleader as affected by bankruptcy.—It is often important to consider, what is the effect upon interpleader proceedings, when, either before or after they have been instituted by a sheriff, the execution debtor is involved in bankruptcy, or winding up proceedings; and also the position of an assignee in bankruptcy, when he is either the applicant or a claimant in stakeholder's interpleader.

Division of the subject.—A consideration of the subject shows that it divides itself into two parts in sheriff's cases, first, that in which the only claimants are the execution creditor and the assignee or trustee, and secondly, that in which a third party appears claiming adversely to both of these. Another important consideration is the date at which the insolvency proceedings are instituted. It may be before the sheriff has levied, or after he has levied, or after an interpleader order has actually been made directing an issue between the execution creditor and an ordinary claimant, but before the proceeding has run its course.

Further summary of the subject.—The effect of bankruptcy proceedings upon interpleader, depends to a large extent upon the wording of the particular statute which bears upon the question. In some cases, the provision is quite clear, and the rights given to the assignee for the general creditors so paramount, that the sheriff is in no difficulty, and is justified in giving possession of the goods, or even their proceeds after a sale, into the hands of the official assignee, trustee, receiver or liquidator; or in refusing to levy, if the trustee is already in possession, even

though an active execution creditor is insisting that the sheriff should maintain his levy, or levy and interplead. Under another statute, the question of priority of rights may not be so clear, as to justify the sheriff in taking upon himself the burden of deciding between the hostile parties, and so, as will presently appear, he may in many instances relieve himself by invoking the protection which the interpleader statutes afford.

If a sheriff is in doubt, whether he should yield the goods to the assignee, or call the parties before the court upon an interpleader, it is sometimes advisable for him to follow a middle course, by asking for further time in which to make a return to the execution.

When trustee in possession.—If the debtor has made an assignment, or taken advantage of a Bankrupt Act, before the sheriff goes out to levy, and the sheriff, finding the goods in the possession of the assignee, nevertheless seizes them, and then calls upon the execution creditor and the trustee to interplead, his application will be refused with costs. The goods are considered as in the custody of the law, and so cannot be seized by a sheriff, even though he assumes to seize them as the goods of a debtor different from the one whose estate is in bankruptcy. An interpleader will be refused for the further reason, that the court will not bar an assignee's claim, for he is in possession by operation of law. For the same reason, it is wrong for a sheriff to take goods from the possession of a receiver appointed by the court. It is not competent for any person to disturb such possession.¹

If levy follows assignment.—If the assignment takes place first, but the sheriff makes a levy before the assignee takes possession, the sheriff's right to ask for relief will depend upon the strength of the statute, and also upon the fact whether or no there is also present an ordinary claimant asserting title against both. If the assignee will not

¹ *McMaster v. Meakin* (1877), 7 Ont. Pr. 211; *Russell v. East Anglican Ry. Co.* (1850), 3 Mac. & G. 104. But see *Mackay v. Merritt* (1886), 34 W. R. 433.

fight the claim, but the execution creditor desires to do so, interpleader may be maintained.

Where a debtor had made an assignment for the benefit of his creditors before the sheriff seized, and the latter then took out an interpleader summons, and an issue was directed in which the trustee was made plaintiff, it was held that the onus of proving that the deed was irrevocable and binding, as against the execution creditor, was upon the trustee, who must prove that the deed had gone beyond the stage of being revocable. The burden of giving affirmative evidence lies on the person setting up the deed against the execution.²

When insolvency follows levy.—If the insolvency follows the levy, the sheriff will ordinarily, in a case of any doubt or difficulty, be allowed to bring the assignee and the execution creditor before the court, upon an interpleader application for the purpose of having them litigate between themselves the title to the goods. If the insolvency follows forthwith after the seizure, the question is simple and interpleader may not be necessary. If the execution has proceeded towards completion, or a considerable length of time has elapsed, nice questions often arise as to whether the execution creditor has got beyond the statute, which favours the general creditor, for then interpleader will be allowed in relief of the sheriff.

The practice in England has been, in many cases under such circumstances, to allow the sheriff to call both claimants before the court upon an interpleader,³ and to make the assignee plaintiff in an issue, with the execution creditor as defendant.⁴

² *Admitt v. Hands* (1887), 57 L. T. 370.

³ *Goldschmit v. Hamlet* (1843), 6 Scott N. R. 602; *Child v. Mann* (1867), L. R. 3 Eq. 806; *Lever v. Shepherd* (1891), 90 Law Times, 339; *Purkiss v. Holland* (1887), 31 Sol. J. 702; *Trustee of John Burns, Burns v. Brown* (1895), 1 Q. B. 324.

⁴ *Parker v. Booth* (1831), 1 M. & S. 156; *Northcote v. Beauchamp* (1831), 1 M. & S. 158; *Bently v. Hook* (1834), 2 Dowl. 339, 4 Tyr. 229; *Dibb v. Brooke* (1894), 2 Q. B. 338. For form of order where an action was directed, see *McCormick v. Armstrong* (1837), 2 Jones 388.

In Ontario, the statutory rule which allows a sheriff to interplead when goods taken in execution are claimed by any person not being the person against whom the process issued, has been held general and comprehensive enough to cover nearly every case which can arise, as it was intended it should, and consequently it covers the case of a sheriff, when the execution creditor disputes an assignee's title to the goods levied upon. Such is a fit question to be tried between the parties, and it is a difficulty which a sheriff is entitled to be relieved from.⁶

The same practice prevails in Australia, where it has been held, that a sheriff may interplead, when the goods seized are claimed by a trustee under a deed of assignment by the debtor for creditors.⁶

A sheriff, however, is not justified in interpleading unless he has an actual claim from the assignee. The mere fact that he has received notice that a fiat in bankruptcy has issued, is not sufficient.⁷

When the execution debtor is a firm, the execution creditor's rights will not be prejudiced by a receiving order in bankruptcy against one of the partners, while the goods of the firm levied upon, or the proceeds, are still in the sheriff's hands, and the sheriff may interplead in such a case, when the receiver claims as against the execution.⁸

Insolvency, when interpleader pending.—If an interpleader application is pending, when the debtor makes an assignment under an insolvent act, the sheriff may bring the assignee before the court as a second claimant in the interpleader proceedings. It has been held in Ontario, that under such circumstances, the sheriff is properly before the court, for that is one of the cases to which the interpleader act is intended to apply.⁹

In Manitoba, where, pending the enlargement of a sheriff's interpleader application, an order was made to wind up

⁶ *Burns v. Steele* (1866), 2 Upper Canada L. J. N. S. 189.

⁷ *Beeston v. Donaldson* (1892), 18 Victoria L. R. 208.

⁸ *Bentley v. Hook* (1834), 2 Dowl. 839, 4 Tyr. 229.

⁹ *Dibb v. Brooke* (1894), 2 Q. B. 338.

¹⁰ *Brand v. Bickle* (1898), 4 Ont. Pr. 191.

the debtor, a company, and a liquidator was appointed, the court refused to substitute the liquidator for the execution creditor in the interpleader proceedings at the creditor's request, holding that if the execution creditor did not take an issue he must be barred.¹⁰

In Massachusetts it has been held, that a sheriff may file a bill of interpleader against the assignee in bankruptcy and the execution creditor, when it is doubtful whether as against the creditor the property passed by the assignment.¹¹

Insolvency after interpleader order made.—If an interpleader order has already been made, directing an issue between the execution creditor and an ordinary claimant, or disposing of the matter in some summary way, as by directing a sale and a division, and insolvency intercept the completion of the matter, the question arises, whether rights have been given to the execution creditor by the court through the interpleader order, which are entitled to prevail over the provisions of the Bankrupt Act. In practice, when the assignee appears, the matter is worked out in one of several ways. The sheriff may voluntarily withdraw in favour of the assignee, or an order may be made directing him to do so, in which case the interpleader order is superceded; the sheriff may interplead a second time, or the assignee may be allowed in as a contestant in the issue, or if the proceedings have gone so far that the claimant is defeated, an order may be made in the bankruptcy proceedings directing payment or delivery to the assignee or to the creditor as the case may be.

Sheriff may deliver goods notwithstanding order.—It is the duty of a sheriff in a clear case, where an interpleader order has been made, under which he is ordered to sell, and which is subsisting when he is served with notice of a receiving order in bankruptcy, to hand over the goods or their proceeds to the official receiver, and the sheriff will not be entitled, as against the official receiver or the trustee in

¹⁰ *Blake v. Manitoba Milling Co.* (1891), 8 Man. 427.

¹¹ *Fairbanks v. Belknap* (1883), 135 Mass. 179.

bankruptcy, to costs for any time he may remain in possession after he has been so served.¹²

Where, upon the messenger entering, the sheriff withdrew, leaving him in possession, the court refused an attachment against the sheriff at the suit of the execution creditor, for contempt in not proceeding to a sale pursuant to the interpleader order.¹³

But when an interpleader order is superceded, by an order declaring that the goods seized are the property of the trustee in bankruptcy as against the execution creditor, it will be subject to the claim of the bill of sale holder, or other adverse claimant, who may have been a party to the sheriff's interpleader application.¹⁴

The assignee may be allowed into the issue.—Where a sheriff withdraws from possession under an interpleader order, upon the claimant paying money into court, and bankruptcy proceedings following the trustee applies to be allowed into the issue, the court has discretion and power to make him a party, under the English rule which enacts that in interpleader the court has power to make all such orders as may be just and reasonable. The fact that the original claimant may have a claim which he cannot enforce against the trustee in bankruptcy, is but a reason for adding the assignee.¹⁵

General creditors favoured.—The provision which prevails over, or supercedes, the interpleader machinery which has been set in motion, is that part of a Bankrupt Act which makes the title of the assignee relate back to the commission of an act of bankruptcy by the debtor. The assignee's right to come in, is not to be refused, because the claimant in the interpleader order has paid a sum into court to abide the result of an issue. The money paid in does not stand in the place of the goods. It is paid in to prevent the goods being sold. The fact that the execution

¹² *In re Harrison Ex parte Sheriff of Essex* (1893), 2 Q. B. 111.

¹³ *Collins v. Cliff* (1863), 8 L. T. N. S. 466.

¹⁴ *Ex parte Halling In re Haydon* (1877), 7 Chy. Div. 157.

¹⁵ *Bird v. Mathews* (1882), 46 L. T. N. S. 512.

creditor would have completed his execution by seizure and sale, and been paid in full, but for the delay caused by the first claimant, is no reason why the trustee in bankruptcy should not have the advantage caused by the delay.¹⁶

An execution creditor, therefore, is not entitled to retain the benefit of his execution, against the trustee in bankruptcy of the debtor, unless he has completed the execution before the date of the receiving order. If, while the sheriff has the goods in his possession, an available act of bankruptcy comes to his knowledge, it is his duty to hold the goods for the creditors generally, not for the particular creditor, who through his *fi. fa.* has put him in motion.¹⁷

The judge has no power, upon an interpleader application, to interfere with the rights of the general creditors represented by the trustee in bankruptcy. The interpleader can only deal with the rights of the rival claimants *inter se*; the rights of the general creditors remain wholly unaffected. If a creditor were to obtain a lien, by virtue of the interpleader order, the result would be, that a creditor would only have to seize goods, upon which some one else had a sham claim, and avail himself of that claim, to defeat the equal distribution among creditors, which a Bankrupt Act is meant to effect.¹⁸

Assignee may take sides with execution creditor.—It is not always necessary that an assignee should at once assert his paramount right to take goods from the sheriff, he may, if he choose, take sides with an execution creditor, with the object of contesting or getting rid of the claim of a chattel mortgagee. Thus, where a sheriff had seized goods, which were claimed by a chattel mortgagee, and subsequently the debtor made an assignment for creditors and the sheriff interpleaded, it was held, that the assignee was not bound to demand the goods from the sheriff, but might intervene

¹⁶ *Bird v. Mathews* (1882), 46 L. T. N. S. 512; *O'Brien v. Brodie* (1866), L. R. 1 Ex. 302; *Mackay v. Merritt* (1888), 34 W. R. 433.

¹⁷ *Trustee of John Burns, Burns v. Brown* (1895), 1 Q. B. 324; *Brand v. Bickle* (1868), 4 Ont. Pr. 191.

¹⁸ *Ex parte Halling in re Haydon* (1877), 7 Chy. Div. 157; overruling *Parsons v. Lloyd* (1866), L. R. 1 Ex. 307.

in the interpleader proceedings, and ask that an order be made for a sale of the goods under the interpleader rules. It was further held, that the Bankrupt Act did not supercede the interpleader rule.¹⁹

A sheriff seized, and excepted from the levy certain tools of the debtor, a farrier, to the value of £5 as exemption under the English Debtor's Act. The goods having been claimed by the debtor and his wife, the sheriff interpleaded, with the result that in the issue the claim of the debtor and his wife was barred. The sheriff then sold part of the goods, and while the balance was advertised for sale, a receiving order was made against the debtor, and in the bankruptcy proceedings the debtor claimed exemptions to the value of £20, as provided in the Bankrupt Act, and asked that the sheriff be restrained from selling. The assignee did not claim the goods, and declined to intervene. It was held, that it was the duty of the sheriff to complete his sale and pay the proceeds, less his charges, to the assignee, notwithstanding the fact, that if the assignee had asked for the goods and received them, the bankrupt would then have been entitled to further tools to the value of £15.²⁰

The effect of the sheriff's sale.—When a Bankrupt Act provides that an execution creditor shall not retain the benefit of his execution, unless completed by seizure and sale, and then only in case no bankruptcy proceedings are instituted within fourteen days thereafter; the sale by a sheriff under an interpleader order has been held to complete the execution by seizure and sale, so that a receiver intervening within the fourteen days, is entitled to the fund, when the claim of the adverse claimant has been withdrawn or defeated. The Interpleader Act protects the sheriff, but does not alter the capacity in which he sells, or that in which he holds the proceeds of goods levied upon. He sells in his capacity of sheriff under the writ of *fi. fa.*, not under some trust or duty imposed by the Interpleader Act.²¹

¹⁹ *Stern v. Tegner* (1898), 1 Q. B. 37.

²⁰ *Re Dawson* (1899), 2 Q. B. 54.

²¹ *Henthcote v. Livesley* (1887), 19 Q. B. D. 285.

The New South Wales Insolvent Act provides, that where a debtor's goods have been taken in execution but not sold, they shall, in case of bankruptcy, form part of the insolvent's estate. And where an interpleader order was made, under which the claimant paid a sum into court and took the goods, and the debtor subsequently became insolvent, it was held, that this was equivalent to a sale, and the court refused to stay the interpleader proceedings. The claimant having abandoned, it was further held that the execution creditor was entitled to the money.²²

In another case, where the claimant paid the value of the goods into court, and the debtor became insolvent, the court directed that the money should be paid out to the claimant, upon the execution creditor failing to proceed;²³ and where, under similar circumstances, the claimant, thinking that the interpleader was at an end by reason of the insolvency, failed to prosecute, an order was made barring his claim, and directing payment out to the execution creditor.²⁴

Stakeholders' cases.—A stakeholder who is liable for a debt which he is willing to pay, will be allowed relief by interpleader, although the debt be claimed by the assignee in insolvency of the creditor, and also by the creditor himself, or by an ordinary assignee of the latter. If the creditor has sought to enforce the collection of the debt by an action, in which he alleges that the commission in bankruptcy is invalid, and that he intends to dispute it, such action must be stayed by the interpleader, for the court will never permit a bankrupt to proceed in an action affecting the validity of the commission when the assignee is not present.²⁵

²² *Harris v. Solomon* (1879), 2 S. C. R. N. S. Wales N. S. 207.

²³ *London v. Dunncliffe* (1887), 4 N. S. Wales, W. N. 40.

²⁴ *Castlemaine v. Howell* (1887), 4 N. S. Wales, W. N. 64.

²⁵ *Lowndes v. Cornford* (1811), 18 Ves. Jun. 299; *Fallon v. Britannia* (1877), 11 Ir. R. O. L. 157; *Re Hilton* (1892), 67 L. T. 594; *Linman v. Dunnick* (1885), 1 Ohio Circuit Cts. 563. But see contra *Harlow v. Crowley* (1818), Buck, 275; *Henry v. Glass* (1885), 2 Man. 97.

Thus, where an uncertificated bankrupt brought an action for the value of work done by him after his bankruptcy, and the amount found due was also claimed by the bankrupt's assignee, the defendant was allowed relief by interpleader.²⁶

The same practice prevails when one claimant is a receiver appointed by the court. Thus, where a deposit was claimed from a bank by a receiver appointed at the instance of the depositor's creditors, and also by a present holder of the certificate who had taken it after the receiver had been appointed, the bank was awarded an interpleader.²⁷

Interpleader by assignee.—In some cases an assignee in insolvency has himself been allowed to maintain interpleader proceedings, where goods in his possession have been claimed adversely by a chattel mortgagee or some other adverse claimant. Thus, in an Ontario case, an assignee was permitted to call before the court as claimants, the creditors who had sued out the writ of attachment in insolvency, and a third person who alleged that the debtor had transferred the goods to him. The court would not give effect to the creditors' objection, that the assignee was not a mere stakeholder in the proper meaning of that term, and should have applied for relief in the insolvency proceedings.²⁸

In Missouri, an assignee for creditors who was in possession of a fund, the proceeds of goods sold, was allowed to maintain interpleader, where the money was claimed by the creditors and by a chattel mortgagee.²⁹ But in Maine, relief was refused to an assignee, upon the ground that he was himself really a claimant upon the fund in his own possession;³⁰ and in a Maryland case, the court refused to interfere, where the validity of the assignment

²⁶ *Jones v. Turnbull* (1837), 2 M. & W. 601.

²⁷ *James v. Sams* (1892), 90 Ga. 404.

²⁸ *Wells v. Hews* (1876), 24 Grant (Ont.) 131.

²⁹ *Re Gregg's Assignment, Fee v. Wolfe* (1898), 74 Mo. App. 58. See also *Bettman v. Hunt*, 12 Weekly Law Bulletin (Ohio), 286.

³⁰ *Castner v. Twitchell* (1898), 91 Me. 524.

was in question, because the assignee was interested in upholding it, on account of the commission which would accrue, and so was not an indifferent stakeholder.²¹

London Court of Bankruptcy.—Where goods seized by a sheriff under an execution issued by the London, England, Court of Bankruptcy, were claimed adversely, it was held that such court had jurisdiction to make an interpleader order, because, by the statute, the Court of Bankruptcy had all the jurisdiction formerly possessed by the Superior Courts of Law.²²

²¹ *National Park Bank v. Lanahan* (1883), 60 Md. 477.

²² *Sheriff of Middlesex in re Buck* (1879), 10 Chy. Div. 573.

CHAPTER XII.

EVIDENCE AT THE TRIAL.

Depends on the form of the proceeding.—The evidence which is to be adduced by the claimants, when they come before the trial judge, depends very largely upon the form of the proceeding which has been directed by the interpleader order or decree. If an action has been directed, the claimants stand before the court subject to such rules of evidence as would be applicable, had one of them originally commenced an action against the other.¹ But where an issue has been directed, it follows from the brief way in which it is worded, and in the absence of detailed pleadings, that many questions must arise in relation to the evidence which each party may tender in proof of his own title, or for the purpose of disproving a *prima facie* title established by his opponent, as well as to matters which are assumed by the court without formal proof, and which neither party may controvert.

Construction of the issue.—Interpleader issues are directed to inform the conscience of the court, and unless they are framed with a view of meeting the real questions likely to arise, they are of little benefit. They are the creatures of the court, and the court has a right to deal with them, as if they stated very fully the question which the parties go down to try, instead of looking at the short way in which it may be stated in the issue. The modern

¹ *Horton v. Baptist Church* (1861), 34 Vt. 300; *Willson v. Salmon* (1889), 45 N. J. Eq. 257..

view of an interpleader issue is, whatever the form the substance must be looked at, and the object being to inform the conscience of the court, it is often immaterial for that purpose, which party is made plaintiff.²

The onus.—The proper rule in framing an issue, is to put in the position of plaintiff the party upon whom the substantial onus of proof should properly rest.³ When a tenant has called upon his landlord and a third party to interplead, the burden is not upon the landlord to allege and prove that he was a *bona fide* purchaser for value without notice, but is upon the third party to displace the landlord's title.⁴

Grounds which claimants may set up.—Where the issue contains no limitation of the title which a claimant is to be allowed to set up to the property in question, it is open to him to set up any ground by which he may substantiate his claim.⁵ The generality of the terms of an issue, "whether the goods are the property of one claimant as against the other," shows that it is the object of the court, in directing it to be tried, to place every thing in issue which constitutes the title of the plaintiff. If it be intended to limit the enquiry, the issue should be narrowed when the parties are before the court upon the original interpleader application.⁶

Technical objections.—It is generally desirable, that technical objections, which prevent the trial of the matter really in question, should be waived or disallowed, in order that all the information which it is the object of the issue to obtain may be supplied.⁷ Formerly the rules regulating the admissibility of evidence on interpleader issues, were

² *Carne v. Brice* (1840), 7 M. & W. 183; *Shingler v. Holt* (1861), 30 L. J. Ex. 322; 7 H. & N. 65; *Bird v. Crabb* (1861), 7 H. & N. 996; *Muckleston v. Smith* (1867), 17 U. C. C. P. 401; *Bryce v. Kinnee* (1892), 14 Ont. Pr. 509.

³ *Doran v. Toronto Suspender Co.* (1890), 14 Ont. Pr. 103.

⁴ *Warnock v. Harlow* (1892), 96 Cal. 208.

⁵ *Re Hilton* (1892), 7 L. T. 594.

⁶ *Loth v. Melville* (1841), 9 Dowl. 882; *Bosanquet v. Woodford* (1843), 5 Q. B. 310; *Pooley v. Goodwin* (1835), 5 H. & M. 466; 1 H. & W. 567.

⁷ *Waterton v. Baker* (1868), 17 L. T. N. S. 494; *Smith v. White* (1871), 5 Ir. L. T. R. 74.

not adhered to with the same strictness as on ordinary trials.⁹ In 1878, however, in refusing to give effect to a contention that a technical objection should not be received in interpleader, an English judge remarked, "that of late years there has been no difference between the evidence received upon the trial of an interpleader issue, and in other cases."¹⁰

Because an issue is directed to inform the conscience of the court, upon the particular question of fact sent down for trial, it has been held in some instances, that technical legal objections ought not to prevail at the trial, for otherwise it would be idle to direct the issue, and so put the parties to the delay and expense of a useless trial. Thus, the court refused to hear an objection, that in the affidavit annexed to a marriage settlement, under which a claimant made title, the grantor was not described by his real occupation of a ship broker or coal merchant, being designated merely as broker;¹⁰ as also an objection, in an issue sent for trial between two corporations, that certain individuals were members of both.¹¹

The fact, that the exclusion of evidence upon some point, may prevent the whole question from being decided upon the trial of the issue, is no reason for its admission, when such evidence may still be properly received when the parties go back to chambers for a final order.¹²

Matters not controvertible.—In some instances the court assumes as a basis for an issue, the existence of certain facts, and these may not be controverted upon the trial of the issue. If either party desires to disprove such matters, he must have the issue pointed to them.¹³ Thus, as a general rule, in sheriff's interpleader an execution creditor is

⁹ Roscoe's *Nisi Prius*, 16th Ed., p. 281.

¹⁰ *Emmott v. Marchant* (1878), 3 Q. B. D. 555.

¹¹ *Gugen v. Sampson* (1866), 4 F. & F. 974.

¹² *Bosanquet v. Woodford* (1845), 5 Q. B. 310.

¹³ *Bird v. Crabb* (1861), 7 H. & N. 996; 30 L. J. Ex. 318; *Muckleston v. Smith* (1867), 17 U. C. C. P. 401.

¹⁴ *Linnit v. Chaffers* (1843), 4 Q. B. 762.

not obliged to prove his judgment and execution;¹⁴ nor can a question, as to whether the sheriff had abandoned the goods, be raised on the trial of the issue.¹⁵ And where one claimant derived his title through a railway security, known as a Lloyd's bond, the trial judge was held to have properly excluded all evidence as to the circumstances under which money was originally loaned upon the security;¹⁶ so, in an issue between an execution creditor and a trustee in bankruptcy, as to whether the execution is valid as against the fiat in bankruptcy, the execution creditor cannot give evidence to show that the debtor never really became bankrupt, and that the act of bankruptcy was only colourable.¹⁷

Where a claimant, who was possessed of property, had been confined in a lunatic asylum, and upon the lunacy proceedings being compromised, had placed her title deeds with a certain custodian under an agreement; upon the trial of an issue, as to whether the claimant, notwithstanding the agreement, was entitled to the possession of the title deeds, the court held that it was not necessary for her to prove her title, the question being only whether the agreement prevented her from insisting upon her title.¹⁸

In a Manitoba case, where defendants against whom judgment had been obtained claimed upon an interpleader, that the property seized as goods was real estate and so not exigible, it was held that for the purpose of the interpleader the property must be assumed to be chattel.¹⁹

The right of a national bank in the United States, to enter into an agreement with its debtor, whom it has sold out by a sheriff's sale, to continue the business as its agent, cannot be enquired into on a sheriff's interpleader.²⁰

¹⁴ *Edwards v. Matthews* (1847), 4 Carr. & K. 148; *Richards v. Jenkins* (1887), 18 Q. B. D. 451; *Holden v. Langley* (1862), 11 U. C. C. P. 407; *McWhirter v. Learmouth* (1868), 18 U. C. C. P. 136; *Ripstein v. British Canadian L. & I. Co.* (1890), 7 Man. 110; *Blum v. Warner* (1879), 1 Leg. Rec. Pa. 113.

¹⁵ *Guy v. Ambrose* (1886), 3 N. S. Wales W. N. 136.

¹⁶ *Blackmore v. Yates* (1867), 2 L. R. Ex. 225.

¹⁷ *Linnit v. Chaffers* (1843), 4 Q. B. 762.

¹⁸ *Cumming v. Ince* (1847), 11 Q. B. 112.

¹⁹ *Dixon v. McKay* (1899), 12 Man. 514.

²⁰ *Lippincott v. Longbottom* (1889), 6 C. C. Pa. 503.

Judgment and execution as evidence.—An execution creditor, as mentioned above, is not required as against the claimant, to prove his judgment and execution.²¹ In practice he subpoenas the sheriff to produce the writ of *fi. fa.*, and thus proves the seizure under an execution and judgment which are assumed to be regular. When the claimant is called upon to show that the goods are his, as against the execution creditor, the form of the issue assumes the right to seize by virtue of a judgment, and the creditor is not bound on the trial to show that he has recovered a judgment. If he succeeds, it does not matter to the claimant, whether he has recovered a judgment or not. If he fails he has no right to contest the seizure.²²

But if the issue is between two execution creditors each claiming priority,²³ or between an attaching creditor and an execution creditor²⁴ the creditor upon whom the onus rests may be required to prove a judgment as well as an execution, or his judgment may be impeached by the other claimant.

It has been held in Pennsylvania, that the claimant may attack the *bona fides* of the judgment upon which the execution was issued, and show that it is fraudulent, when the claimant's title is founded upon transactions between him and the debtor.²⁵

When goods are seized in the possession of the claimant, the claimant, claiming under a sale to him by a sheriff under a previous execution, is not called on to prove the judgment under which such execution issued.²⁶

When plaintiff shows title to part.—The issue is not to be decided against one claimant, if he claim all the goods, and it turns out that he is only entitled to some of them.

²¹ *McWhirter v. Learmouth* (1868), 18 U. C. C. P. 136; *Ripstein v. British Canadian L. & I. Co.* (1890), 7 Man. 119.

²² *Holden v. Langley* (1862), 11 U. C. C. P. 407; *Levy v. Davies* (1886), 12 Ont. Pr. 93.

²³ *Newman v. Lyons* (1892), 8 Man. 271.

²⁴ *Macdonald v. Cummings* (1892), 8 Man. 406.

²⁵ *Hartley v. Weldeman*, 3 Dia. Rep. Pa. 336.

²⁶ *Hammill v. De Wolf* (1861), 10 U. C. C. P. 419.

The issue is to be taken distributively, and it means are these goods or part of them, and if so what part, the property of the claimant; and there will accordingly be a finding for the plaintiff for such articles as he proves title to, and for the defendant as to the residue. It is immaterial therefore, whether an issue refers to the goods seized, or the goods seized or any part thereof.²⁷ The onus lies on a plaintiff claimant, to show clearly to what articles he has a title, and if he be unable to do so, he can recover none.²⁸

Claimant with a limited title.—It is not necessary for the court to find that the property belongs to one claimant or to the other absolutely; having the subject matter under its control, the court may fasten upon it, either in whole or in part any equitable lien or trust which one of the claimants may have established, though the legal title be in the other. The court is not bound to award the property to him who has the legal title, but may so shape its judgment and distribute the fund, as to do complete equity between the parties.²⁹ This is, in effect, the principle of the English Judicature Act, which enacts, that the court shall in every cause or matter grant such remedies as any of the parties appear entitled to, in respect of every legal or equitable claim properly brought forward, so that as far as possible all matters in controversy may be completely and finally determined.³⁰

Rule in sheriff's cases.—Upon the usual sheriff's issue, as to whether the goods are the property of the claimant as against the execution creditor, the question is not, as to whether they are the property of the claimant absolutely,

²⁷ *Plummer v. Price* (1879), 39 L. T. N. S. 657; *Morewood v. Wilkes* (1833), 6 C. & P. 144; *Feehan v. Bank of Toronto* (1900), 10 U. C. C. P. 32; *Stephens v. McArthur* (1889), 6 Man. 111; *Van Winkle v. Young* (1860), 37 Pa. St. 214; *Rush v. Vought* (1867), 55 Pa. St. 437; *McDermott v. Kline* (1868), 6 Phila. Pa. 553.

²⁸ *Crapper v. Paterson* (1860), 19 U. C. Q. B. 160.

²⁹ *Whitney v. Cowan* (1878), 55 Mica. 626; *Windecker v. Mutual Life Ins. Coy.* (1896), 12 App. Div. N. Y. 73.

³⁰ Eng. Jud. Act, 1873, sec. 24 (7), R. S. O. 1897, c. 51, s. 57 (12).

but are they his in any sense. This form has been adopted for the express purpose of enabling any person lawfully entitled to possession, to sustain his claim against the execution, by showing that he has either a general or a special property in the goods. He will accordingly be allowed to show that he has some interest, which either defeats the right of execution, or is to be respected in its enforcement.²¹ A claimant will therefore be entitled to succeed, when he proves that the legal title is in himself although he is a mere trustee or agent for the management or sale of the property,²² where he shows a lien as an immediate right of possession,²³ where the issue was 'had the claimant any property' the goods having been loaned to him,²⁴ or where he shows title to all the goods though he may be bound to account to a third party for part of their proceeds.²⁵

A *cestui que trust* in possession of goods has a sufficient interest to maintain a claim, without joining the trustee in whom the legal estate is vested;²⁶ so, a claimant on showing that she had an equitable claim at the time of seizure, and that the party in possession was holding for her, was held entitled to succeed.²⁷

Where there are two claimants of goods seized in execution, it is not necessary that they should show a joint ownership. They may either show a joint ownership, or that each owns a part, all that is requisite to defeat the execution is the fact that they are indeed the owners.²⁸

Claimant bound by first claim.—In Pennsylvania, when the claimant in a sheriff's interpleader, claims an absolute and exclusive ownership in the goods seized, he will not be

²¹ *Green v. Stevens* (1857), 2 H. & N. 146; *Schroeder v. Hanrott* (1873), 28 L. T. S. S. 704; *Grant v. Wilson* (1859), 17 U. C. Q. B. 144; *Bryce v. Kinnee* (1892), 14 Ont. Pr. 509.

²² *Campbell v. Clevestine* (1892), 149 Pa. St. 46.

²³ *Rogers v. Kennay* (1846), 9 Q. B. 592.

²⁴ *Green v. Stevens* (1857), 2 H. & N. 146.

²⁵ *Shive v. Flinn* (1890), 134 Pa. St. 158.

²⁶ *Schroeder v. Hanrott* (1873), 28 L. T. N. S. 704; *Connell v. Hickock* (1888), 15 Ont. App. 518.

²⁷ *Black v. Drouillard* (1877), 28 U. C. C. P. 107.

²⁸ *Van Winkle v. Young* (1860), 37 Pa. St. 214.

permitted upon the trial of the issue to set up a limited or restricted title, having made a claim to absolute ownership and thus stayed the creditor's execution, he cannot set up a limited or restricted interest on the trial, because if only a limited interest had been claimed at first, the sheriff might have sold the debtor's interest, and there would have been no need for an interpleader. Thus, having claimed an unqualified proprietorship, if he can only show that he is the debtor's lessee, or a joint ownership with the debtor, or a life estate, or that he has only a lien, the verdict must be for the execution creditor.³⁹

It is also the rule in Pennsylvania, that when a claimant limits his title in the first place by claiming only a qualified property, he is bound by such limitation and cannot on the trial of the issue maintain his claim by proof of absolute ownership, proof of his limited claim will only be permitted.⁴⁰

In Pennsylvania, the issue must correspond with the claim, and the claimant can only sustain the issue by proving his claim as made, thus where the claimant claimed the goods by affidavit, and the evidence showed that he held the goods as agent for another, it was held that the verdict must be for the defendant, and the court refused to allow an amendment by which the principal might be substituted as plaintiff.⁴¹ But it is not error to permit a claimant to amend his declaration by inserting various articles omitted in the original declaration.⁴²

In New South Wales, when a person gives notice to the sheriff that he claims the goods which have been levied upon, on such and such grounds, and gets an issue in general terms, he cannot go beyond the claim which he first made and rely upon other grounds.⁴³

³⁹ Meyer v. Prentzell (1850), 33 Pa. St. 482; Ward v. Zane (1860), 4 Phila. Pa. 68; Stewart v. Wilson (1862), 42 Pa. St. 450; McDermott v. Kline (1868), 6 Phila. Pa. 553; Horton v. McCurdy (1880), 14 Phila. Pa. 221; Lobb v. Ullman (1883), 2 Chest. Pa. 253.

⁴⁰ Waverly v. McKennan (1885), 110 Pa. St. 599.

⁴¹ Campbell v. Wasserman, 9 C. C. Pa. 381.

⁴² Battles v. Sliney (1889), 24 W. N. C. Pa. 71.

⁴³ Thompson v. De Lissa (1881), 2 N. S. Wales L. R. 105.

What claimant must show against an execution.—When the burden of proof is upon the claimant in a sheriff's interpleader, the question is not, whether the execution creditor has a right to seize the goods under his writ, but whether the claimant has such an interest in them as entitles him to resist the seizure. No one has any right to interfere with the execution, except a person who has either a general or a special property in the goods. The creditor with his judgment and execution is considered to have title. If the claimant fail to make out his case, there must be a verdict for the execution creditor, who having a judgment and execution, is not bound to offer any evidence to show a right in himself. If, when the issue comes on for trial, it is proved that the goods were in the possession of the debtor, and the claimant is unable to give any further evidence, and no further evidence is given by either party, the possession of the debtor is *prima facie* evidence that the goods were his, and on that footing the seizure was right, for there is nothing to show that the claimant had any claim. If the claimant goes on further, and gives some evidence, which shows conclusively that he had absolutely nothing to do with the goods, and that his claim was altogether unfounded, the result must be that the issue will be determined in favour of the execution creditor.⁴⁴

The moment at which a claimant disputing an execution must show his title, is at the moment before the sheriff seizes. And an issue worded, whether the goods are the property of the claimant as against the execution creditor at the time of the execution, must be so construed.⁴⁵ It has also been held that he must show title prior to the time at which he interposed his claim.⁴⁶

⁴⁴ *Green v. Rogers* (1845), 2 Carr. & K. 148; *Edwards v. Matthews* (1847), 4 D. & L. 721; 16 L. J. Ex. 291; *Richards v. Jenkins* (1887), 18 Q. B. D. 451; *Grant v. Wilson* (1859), 17 U. C. Q. B. 144; *Conklin v. Sayers*, 1 T. & H. Pr. Pa. 907; *Blum v. Warner* (1879), 1 Leg. Rec. Pa. 113.

⁴⁵ *Richards v. Jenkins* (1887), 18 Q. B. D. 451.

⁴⁶ *Seisel v. Folmar* (1893), 103 Ala. 491.

As a general rule, when a claimant is in possession, evidence of that fact is sufficient to enable him to establish his claim. Thus where an execution creditor, according to his own showing, has no right to seize, the claimant needs no better title than his possession to enable him to succeed.⁴⁷ In Pennsylvania, however, it has been held, that the claimant in a feigned issue must prove title to the goods, it is not sufficient to show mere possession.⁴⁸

When claimant may not raise *jus tertii*.—When it appears that the claimant was not in possession and that he has absolutely no interest in the goods seized, he will not be allowed as a general rule to set up the title of a third party, otherwise known as the *jus tertii*, with the object of defeating the execution, as for instance by showing, that the title is in the debtor's assignee in bankruptcy, and not in the debtor at all.⁴⁹ He must recover upon the strength of his own title, and not upon the weakness or want of title of the attachment creditor.⁵⁰ Evidence which does not go to establish the ownership of the claimant is irrelevant. The object, is to allow the claimant to show that it is his, and if he has no title, it is a matter of no concern to him that some other person's property may be wrongfully seized or sold by the sheriff.⁵¹

A claimant cannot give evidence of a seizure under a prior execution, or of a landlord's distress, with the object of defeating the present execution creditor's claim to a balance of moneys remaining after the first execution was satisfied;⁵² nor can a claimant show that the execution creditor is really the assignee in bankruptcy of the judgment

⁴⁷ *Ferrie v. Cleghorn* (1860), 19 U. C. Q. B. 24.

⁴⁸ *Blommingdale v. Victor* (1892), 147 Pa. St. 371.

⁴⁹ *Carne v. Brice* (1840), 7 M. & W. 183; *Green v. Rogers* (1845), 2 Carr. & K. 148; *Richards v. Jenkins* (1887), 18 Q. B. D. 451; *O'Callaghan v. Cowan* (1877), 41 U. C. Q. B. 272.

⁵⁰ *Seisel v. Folmar* (1893), 103 Ala. 491; *Jennings v. Mather* (1901), 1 Q. B. 108.

⁵¹ *Grant v. Hill* (1863), 5 Phila. Pa. 173; *Thompson v. Waterman* (1897), 100 Ga. 586.

⁵² *Belcher v. Brown* (1848), 6 C. B. 608.

debtor, in order to estop the creditor from claiming the goods levied on for his own personal debt.⁵³

When claimant may set up *jus tertii*.—But if the claimant claims through or under, or by the authority of a third party, he may set up the *jus tertii*, or title of such third party, so as to defeat the execution. It is competent for him to show any facts warranting his interference with the process of the execution, even if the property in the goods be in another, provided always that it will not work a surprise upon the execution creditor, and that the claimant appears to be in privity with or claiming under the real owner.⁵⁴ Where the claimant was a second mortgagee of goods, having only an equity of redemption, he was allowed to set up a *jus tertii* to the extent of saying, 'you cannot sell either as against the first mortgagee or as against me, I have all the property in the goods which the first mortgagee has not.'⁵⁵

An issue worded, 'are the goods the property of the claimant,' may be amended at the trial by adding the words, 'as against the execution creditor,' so as to let in the question of the *jus tertii* for the benefit of the claimant and his privity.⁵⁶

A claimant under a bill of sale from the debtor, may raise the question that part of the goods were exemptions, and that the debtor could do what he pleased with them, although the question of exemptions may not have been raised when the sheriff seized.⁵⁷

When the claimant is defendant, and the burden consequently upon the execution creditor to show that the goods are *exigiti* by evidence of title in the debtor, it would seem upon principle, in the absence of any reported decision, that the claimant may give evidence of a *jus tertii*, and so

⁵³ Rhoads v. Heffner (1880), 1 Walk. Pa. 377.

⁵⁴ Belcher v. Brown (1848), 6 C. B. 608; Bryce v. Kinnee (1892), 14 Ont. Pr. 509; O'Callaghan v. Cowan (1877), 41 U. C. Q. B. 272.

⁵⁵ Usher v. Martin (1889), 24 Q. B. D. 272.

⁵⁶ Bryce v. Kinnee (1892), 14 Ont. Pr. 509.

⁵⁷ Field v. Hart (1895), 22 Ont. App. 449.

defeat a *prima facie* title shown by the creditor in the debtor.

When execution creditor may set up *jus tertii*.—When the onus is on the claimant, and he has given evidence which shows a *prima facie* title in himself, it is competent for the defendant the execution creditor to defeat the plaintiff's title, by showing that the real title to the goods was not in the claimant at the time of seizure, but in some other party. Thus, where the claimant claims under a bill of sale from the debtor, his title will be negatived, if the execution creditor can show a prior bill of sale to another, or that the goods passed to an assignee in bankruptcy before the claimant acquired his title, or that the bill of sale is null and void, having been made without consideration and for the purpose of defeating creditors. To enable the creditor to give such evidence, it is not necessary that the issue be expressed to try whether the instrument under which the claimant claims is void for any reason, nor that the interpleader order should provide that such a course shall be open to the execution creditor.⁵⁵

When execution creditor can not set up *jus tertii*.—But when the execution creditor is plaintiff, and the onus of proof is upon him, it has been said that neither on authority nor on principle can he justify the taking of the property from the possession of the claimant, by showing title in a stranger, the burden rests upon him to displace the title of the claimant by showing title in the debtor.⁵⁶

⁵⁵ *Chase v. Goble* (1841), 2 M. & G. 980; *Gadaden v. Barrow* (1854), 9 Ex. 514; *Richards v. Jenkins* (1887), 18 Q. B. D. 451; *Grant v. Willson* (1859), 17 U. C. Q. B. 144; *Newman v. Lyons* (1892), 8 Man. 271. But see *Edwards v. English* (1857), 7 Ell. & Bl. 564, where the court refused to allow the creditor to set up a prior bill of sale, bad as against the creditor, but good as against the claimant, the issue being in the narrow words, "had the debtor goods liable to be taken in execution"; also *Shingler v. Holt* (1861), 30 L. J. Ex. 322; 7 H. & N. 65, where the execution creditor was not allowed to show that the claimant's husband was really entitled, as it was pointed out that such question could afterwards be determined in chambers.

⁵⁶ *Smith v. White* (1871), 5 Ir. L. T. R. 74; *Ovens v. Bull* (1876), 1 Ont. App. 62; *Union Bank v. Tizzard* (1893), 13 Can. L. T. 324; 9 Man. 149.

Questions of estoppel.—Although an execution debtor may be estopped from disputing the title of a claimant to whom he has made a transfer, this estoppel does not prevent the execution creditor from showing that the claimant has no title as against him. Such estoppel gives the claimant no real title or interest in the goods. It merely prevents the debtor who is estopped, from saying as against the claimant, the goods do not belong to you, although in fact they do not belong to him, and it only takes effect between parties and privies. If the execution creditor could, for this purpose, be said to claim through and under the execution debtor, so as to be in privity with him, he might be estopped. But he cannot be said to so claim, he claims through and by the law as against the execution debtor, and not through and under him. A sheriff, accordingly, who comes to seize armed with a writ of execution, in favour of a creditor, is not bound by estoppels which would prevent the debtor from resisting the claimant's title.⁶⁰ As expressed in Pennsylvania, the validity of a transaction between the claimant and debtor, is not the test of its validity against the execution creditor.⁶¹

The mere fact that a claimant has taken some transfer from the execution debtor, after the writ was placed in the sheriff's hands, should not, in the absence of any explanation, be allowed to estop the claimant from denying the debtor's title, for such a transfer may merely be a confirmatory assignment, or an assignment of such an interest as would not be bound by an execution.⁶²

When an insurance company files a bill of interpleader, to get rid of adverse claimants, and pays the insurance moneys into court, questions of insurable interest and of misrepresentation cannot be raised by the defendants. The insurance company alone can raise the question of insurable interest.⁶³

⁶⁰ *Richards v. Jenkins* (1887), 18 Q. B. D. 451; *Richards v. Johnston* (1859), 28 L. J. Ex. 322; 4 H. & M. 660.

⁶¹ *Janney v. Howard* (1892), 150 Pa. St. 339.

⁶² *Macaulay v. Marshall* (1860), 20 U. C. Q. B. 273.

⁶³ *John Hancock Mutual Life Ins. Co. v. Ladver* (1900), 30 Ins. L. J. 363 (R. I.)

When superior title outstanding.—Where there is really adverse title in a third person who is not present, which, if that party chose to assert it must prevail over that of both the claimants alike, and that person takes no step and does not seek to enforce his superior title, the decision will be between the parties present, upon their titles apart from that of the superior one. This is a legitimate application of the maxim, '*potior est conditio defendentis*.'⁶⁴

The successful claimant, therefore, acquires a good title to the moneys in question, and that notwithstanding the fact that there may actually be another claimant, who still has a right of action against the stakeholder for the same fund.⁶⁵ But in a Missouri case, where the court found that neither claimant was entitled, but that the money belonged to another, the matter was remanded so that such other might be brought into court.⁶⁶

A judgment in favour of the claimant on a sheriff's interpleader as against one execution creditor, is not evidence of ownership on another issue, as against a second execution creditor.⁶⁷

When evidence does not show who is entitled.—If the facts before the court are not sufficient to enable it to decide the point at issue, it should adjudicate against the party, whose duty it is to put the necessary facts in evidence.⁶⁸ Thus, where the titles of both claimants appeared defective, the one who was in possession was held entitled to succeed.⁶⁹

Where the property is a fund in court, the court will not actively interfere to dispose of the fund, except in favour of one, who from proof appears best entitled. Accordingly, when one claimant has died, and the proceedings have abated

⁶⁴ *Richards v. Jenkins* (1887), 17 Q. B. D. 544.

⁶⁵ *Reynolds v. Aetna Life Ins. Co.* (1896), 6 App. Div. N. Y. 254.

⁶⁶ *Keener v. Grand Lodge A. O. U. W.* (1889), 38 Mo. App. 543.

⁶⁷ *King v. Faber* (1865), 51 Pa. St. 387; *Pounder v. Foos*, 1 Walk. Pa. 27.

⁶⁸ *Ex p. Waldron* (1870), 9 N. S. Wales S. C. R. 329.

⁶⁹ *Davis v. Levey* (1861), 11 U. C. C. P. 292.

as to him, the other cannot have the fund merely because he is the only claimant left.⁷⁰

It has been said, that the claimant who succeeds must make out a case, such as would have entitled him to succeed against the stakeholder or debtor.⁷¹

Evidence restricted to subject in dispute.—The evidence must be limited to the property which was the subject of the interpleader. The contest proceeds between the claimants to the specific property involved, and as to that property alone. To permit outside issues, and matters affecting the claimants, but not connected with the subject of the action, would confound the action and lead to confusion.⁷²

Admissions by the applicant.—Admissions or statements made by the stakeholder or other applicant for relief by interpleader, should not be used as evidence at the trial between the claimants, thus, one claimant cannot give in evidence, that the applicant stated that he thought such claimant was entitled.⁷³ And where the applicant obtains evidence under a commission to establish his right to relief, the evidence so obtained cannot afterwards be used upon the issue between the claimants.⁷⁴ The fact that the applicant pays the money into court, does not in any way better or prejudice the legal position of either claimant.⁷⁵ But in California, where a tenant interpleaded his landlord and a stranger to the lease, the stranger was allowed to avail himself of the tenant's admission, that he owed the money to which ever of the claimants was entitled to it.⁷⁶

Execution debtor as a witness.—Admissions by the execution debtor have sometimes been refused as evidence, upon

⁷⁰ *Pillow v. Aldridge* (1843), 2 Hum. Tenn. 287.

⁷¹ *Ireland v. Ireland* (1886), 42 Hun. N. Y. 212.

⁷² *Windecker v. Mutual Life Ins. Co.* (1896), 12 App. Div. N. Y. 73.

⁷³ *Shipman v. Frech* (1889), 15 Daly N. Y. 151.

⁷⁴ *Kemp v. Dickinson* (1880), 22 Hun. N. Y. 593.

⁷⁵ *Ireland v. Ireland* (1886), 42 Hun. N. Y. 212; *Ballou v. Gile* (1880), 50 Wis. 614; *Keener v. Grand Lodge A. O. U. W.* (1889), 38 Mo. App. 543.

⁷⁶ *Warnock v. Harlow* (1892), 93 Cal. 298.

the issue in a sheriff's interpleader. Thus, they are not receivable in evidence for the claimant, when made prior to the date of the assignment under which he alleges title;⁷⁷ and, on an issue between a garnishing creditor and a third party claiming the attached moneys, evidence of an admission by the debtor was refused admission when tendered by the third party.⁷⁸

In Pennsylvania, the execution debtor is considered a competent witness for either the execution creditor or the claimant, but the party calling the debtor has no right to examine him, as if on cross-examination, and is bound by his testimony.⁷⁹

On an issue involving the validity of a judgment by confession, declarations by the debtor in the absence of the execution creditor, tending to show that the judgment was fraudulent, have been held inadmissible, without prior evidence that the execution creditor was a party to the fraud.⁸⁰

Married woman, in Pennsylvania.—When the claimant is the wife of the debtor in whose possession the goods have been seized, the rule in Pennsylvania is, that she must show by clear and preponderating evidence that she is entitled. The presumption is that the goods belong to her husband, and the burden is upon her.⁸¹ The husband's declarations adverse to the wife's claim are not admissible in evidence;⁸² and the wife is not a competent witness to support her own title, unless her husband disclaims ownership.⁸³

Claims under chattel mortgages.—When a chattel mortgagee who is plaintiff in an issue, gives proof of a mortgage duly executed, this shows that the title and property in the goods passed from the judgment debtor to the mortgagee

⁷⁷ *Coole v. Braham* (1840), 3 Ex. 183; 18 L. J. Ex. 105.

⁷⁸ *Marshall v. May* (1899), 12 Man. 381.

⁷⁹ *Krall v. Doutrich* (1894), 3 Dis. Rep. Pa. 12; *Kisterbock v. Lanning* (1886), 19 W. N. C. Pa. 54; *Unangst v. Goodyear* (1891), 141 Pa. St. 127.

⁸⁰ *Unangst v. Goodyear* (1891), 141 Pa. St. 127.

⁸¹ *Kingsbury v. Davidson* (1886), 112 Pa. St. 380; *Spering v. Laughlin* (1886), 113 Pa. St. 209.

⁸² *Martin v. Rutt* (1889), 127 Pa. St. 380.

⁸³ *Bornstein v. Jacobs* (1888), 4 L. I. Pa. 4, 14; *Norbeck v. Davis* (1893), 157 Pa. St. 399.

before the seizure. The plaintiff has then proved enough to cast the burden of attack upon the execution creditor.⁸⁸ The plaintiff, however, must produce the copy or duplicate filed, to show that it is in the same terms as that proved to have been executed;⁸⁹ and must also afford proof that the goods seized by the sheriff are the same as the goods mortgaged.⁹⁰ If the mortgage moneys have been satisfied, the mortgagee cannot then, as plaintiff in an issue, rely on his own bare legal title.⁹¹

Where the plaintiff claims under a bill of sale from a sheriff, the bill of sale though it may not, *per se*, be evidence of the title of the claimant, is so, coupled with the evidence of the seizure by the sheriff before the execution of the bill of sale.⁹²

The fact that a chattel mortgagee, claiming goods taken in execution as the goods of his mortgagor, subsequently directs the sheriff to sell under the execution, does not necessarily amount to a waiver of his claim under his mortgage.⁹³

When the title to goods purchased from a chattel mortgagee under the power in his mortgage is contested, on an interpleader issue, by an execution creditor of the mortgagor, the purchaser is entitled to succeed, when it appears that the seizure was made after he acquired his title.⁹⁴

A chattel mortgagee of crops to be grown, cannot prevail over a prior execution in the hands of the sheriff, against the goods of the mortgagor.⁹⁵

Questions of mistake.—A mistake appearing on the face of an issue, as to the statute under which it is directed, does not invalidate the issue.⁹⁶ Where one of the plaintiffs in an issue was misnamed, being named Robert Mar Fisher

⁸⁸ *Furlong v. Reid* (1886), 12 Ont. 607.

⁸⁹ *Emmott v. Marchant* (1878), 3 Q. B. D. 555.

⁹⁰ *Jones v. Jenkins* (1864), 25 U. C. Q. B. 151.

⁹¹ *Waterton v. Baker* (1868), 17 L. T. N. S. 494.

⁹² *Hornidge v. Cooper* (1858), 27 L. J. Ex. 314.

⁹³ *Segsworth v. Meriden* (1883), 3 Ont. 413.

⁹⁴ *Gillard v. Bollert* (1896), 24 Ont. 147.

⁹⁵ *Clifford v. Logan* (1894), 9 Man. 423.

⁹⁶ *Saunderson v. Perrin* (1870), 22 L. T. N. S. 419.

instead of Robert Mar Shaw, it was held that such variance was not a ground of nonsuit, but merely a question of identity, which could be shown at the trial and there amended.⁸³

Where it is necessary to amend an issue, by reason of some mistake appearing in it, the proper practice seems to be, that the party desiring the amendment must go back to chambers, and should not apply at the trial.⁸⁴ The issue as directed by the interpleader order cannot be amended at the trial.⁸⁵ Where the plaintiff delivered an issue which contained an error, he was allowed to amend it *nunc pro tunc* on payment of costs.⁸⁶

The jury.—The usual practice is to provide in the interpleader order whether the issue is to be tried with or without a jury;⁸⁷ and at the trial the plaintiff in the issue is entitled to begin.⁸⁸

When there are two claimants disputing the rights of an execution creditor, one being a purchaser from the other, and they are both plaintiffs, only one counsel will be allowed to address the jury for them both.¹

In New York State, when an action is begun at law, and a third party claiming has been substituted for the defendant, the action becomes thereafter an equitable one, triable by the court, and neither party can demand a jury trial as a matter of right.¹

⁸³ Fisher v. Brock (1862), 8 Man. 137.

⁸⁴ Shingler v. Holt (1861), 30 L. J. Ex. 322; 7 H. & N. 65.

⁸⁵ Grant v. Hill (1863), 5 Phila. Pa. 173; Campbell v. Wasserman, 9 C. C. Pa. 381.

⁸⁶ Mulholland v. Downs (1867), 2 Chy. Chamb. Ont. 233.

⁸⁷ See page 187.

⁸⁸ Edwards v. Matthews (1847), 16 L. J. Ex. 291, 4 D. & L. 721; Alexander v. Handy (1848), 11 Ir. L. R. 328.

⁸⁹ Gayton v. Espin (1859), 1 F. & F. 722.

¹ Clark v. Mosher (1887), 107 N. Y. 128; Dinley v. McCullagh (1895), 92 Hun. N. Y. 454.

CHAPTER XIII.

COSTS AND CHARGES.

Applicant gets his costs.—The practice in Courts of Equity, from the earliest period, both in England and America, has always been to allow a stakeholder, who has made out a case for interpleader, his costs of the interpleader suit, as well as his costs of any proceedings which the claimants may have brought against him, and all these he is entitled to deduct from the fund in his hands before he pays it into court, or otherwise disposes of it under the direction of the court. He has a lien for his costs on the fund or other property, and is not to be obliged to take his chance of getting his costs from the claimant, against whom the court may ultimately decide. The successful claimant eventually gets these costs back, as well as his own costs, from the claimant, who either cannot support his claim, or who fails to appear.¹ The applicant will be entitled to his costs

¹ *Hendry v. Key* (1756), 1 Dick., 291; *Aldrich v. Thompson* (1787), 2 Brown Ch. C. 149; *Hodges v. Smith* (1787), 1 Cox, 357; *Dowson v. Hardcastle* (1791), 2 Cox, 278; *Edensor v. Roberts* (1791), 2 Cox, 280; *Aldridge v. Mesner* (1801), 6 Ves. Jun. 418; *Cowtan v. Williams* (1803), 9 Ves. Jun. 107; *Dunlop v. Hubbard* (1812), 19 Ves. Jun. 205; *Mason v. Hamilton* (1831), 5 Sim. 21; *Campbell v. Solomons* (1823), 1 Sim. & S. 462; *Glynn v. Locke* (1842), 3 Dr. & War. 24; *Symes v. Magnay* (1885), 20 Beav. 47; *Laing v. Zeden* (1874), 9 L. R. Ch. App. 736; *Wells v. Hews* (1870), 24 Gr. (Ont.) 131; *Balchen v. Crawford* (1844), 1 Sandf. Ch. N. Y. 380; *Oppenheim v. Leo Wolf* (1846), 3 Sandf. Ch. N. Y. 571; *Richards v. Salter* (1822), 6 Johns Ch. N. Y. 445; *Spring v. S. C. Ins. Coy.* (1823), 8 Wheat. U. S. 268; *Atkinson v. Manks* (1823), 1 Cow. N. Y. 601; *Canfield v. Morgan* (1824), *Hopk. N. Y.* 250; *Thomson v. Ebbets* (1824), *Hopk. N. Y.* 272; *Aymer v. Gault* (1830), 2 Paige, N. Y. 284; *Badeau v. Rogers* (1830), 2 Paige, N. Y. 209;

in an interpleader suit, notwithstanding the fact, that he might have brought the parties together in prior garnishee proceedings, if it appears that an injunction is necessary for his protection.²

When relief as to part of fund.—If one claimant claims a larger sum than the stakeholder admits or pays into court, such claimant will be allowed to proceed with an action to recover the balance, and the question of costs as between the stakeholder and this claimant will be reserved until the determination of such action, or until further order. But if the claimant does not elect to proceed with an action for the balance, then the costs of the stakeholder will be ordered out of the fund.³

Where an insurance company filed a bill in respect of two life policies, and was held entitled to relief as to one and not as to the other, the bill was dismissed with costs, in respect of one policy, to the defendant entitled, and allowed with costs in respect of the second policy. The costs payable by the plaintiff were set off against the costs to be received by him.⁴

Where costs overlooked in paying over fund.—Where a stakeholder paid the whole fund into court, without asking or deducting his charges, and afterwards sought to have the fund out again, so that he might deduct his charges, an order was made, in Missouri, that he be allowed to appear

Manchester v. Stimson (1853), 2 R. I. 415; *Consociated Presbyterian Soc. v. Staples* (1855), 23 Conn. 544; *Farley v. Blood* (1854), 30 N. H. 354; *First National Bank v. West River Ry. Co.* (1874), 46 Vt. 633; *Rahway Savings Soc. v. Drake* (1874), 25 N. J. Eq. 220; *Wakeman v. Kingsland* (1880), 46 N. J. Eq. 113; *Louisiana v. Clark* (1883), 16 Fed. R. 20, Lou.; *Wayne County Savings Bank v. Airey* (1893), 95 Mich. 520; *Glaser v. Priest* (1888), 29 Mo. App. 1; *Franco v. Joy* (1894), 56 Mo. App. 433; *Christian v. National Life Ins. Co.* (1895), 62 Mo. App. 35; *North Pacific Lumber Co. v. Lang* (1895), 42 P. Repr. 799 (Or.); *Keller v. Bading* (1896), 64 Ill. App. 198; *First National Bank of Battleboro v. West River Ry. Coy.* (1874), 46 Vt. 633. The same rule prevails in the Scotch action of multiplepoinding, *Hepburn v. Rex* (1894), Ct. of Session, 21 R. 1024; see also *Dill v. Ricardo* (1885), Ct. of Session, 12 R. 604; *Pollard v. Galloway* (1881), Ct. of Session, 9 R. 21.

² *Henry v. Glass* (1885), 2 Man. 97.

³ *City Bank v. Bangs* (1831), 2 Palge N. Y. 570.

⁴ *Glynn v. Locke* (1842), 3 Dr. & War. 24.

at the trial to show whether or not he should have an allowance.⁵

Under Interpleader Statutes.—The English Interpleader Act of 1831 provided, that on applications by stakeholders, the court might make such orders as to costs as might appear to be just and reasonable. In the first decisions under this statute, the rule in equity as to costs was adopted, and has been followed ever since, namely, that where the stakeholder has acted fairly with respect to the fund in dispute, he will be entitled in the first instance to his costs out of it; or to a lien for them upon the goods or chattels, if the subject in dispute is other than money. These costs, the ultimately unsuccessful claimant, must repay to the claimant who establishes his title. It is just and reasonable that the stakeholder should be protected, and he will be entitled to his lien, although the successful claimant may object that he will not be able to collect the costs deducted, by reason of the insolvency of the unsuccessful claimant who is ordered to repay them. Both claimants must keep the stakeholder harmless.⁶

Lien for costs.—When the subject matter consists of chattels, the strict order which the stakeholder is entitled to, is, that he shall receive his costs before giving up the property in his hands. It is usual to provide, that either claimant may in the first instance have the property, upon giving security and paying the stakeholder's costs within a

⁵ *Re Gregg's Assignment, Fee v. Wolfe* (1898), 74 Mo. App. 58.

⁶ *Parker v. Linnett* (1834), 2 Dowl. 562; *Duear v. Mackintosh* (1824), 2 Dowl. 730; *Cotter v. Bank of England* (1834), 2 Dowl. 728; *Reeves v. Barraud* (1839), 7 Scott, 281; *Pitchers v. Edney* (1838), 4 Bing. N. C. 721; *Attenborough v. London & St. Katharines Dock Coy.* (1878), 3 C. P. D. 450; *Gillespie v. Robertson* (1878), 14 U. C. L. J. 28; *M'Elheran v. London* (1886), 22 U. C. L. J. 28, 11 Ont. Pr. 181; *Shaw v. Weldon* (1884), 2 New Zealand L. R. 395; *Armit v. Hudson Bay Coy.* (1886), 3 Man. 529. In an early case, where a stakeholder had been offered an indemnity and had refused it, he was not allowed his costs. *Gladstone v. White* (1836), 1 Hodges, 380. Under the English Act a person entitled to costs under an Interpleader Order, was not bound to take out execution under that Act, but might make the order a rule of Court and take out execution under another statute. *Cette v. Bartlett* (1842), 9 M. & W. 840, 1 Dowl. N. S. 928.

certain time, failing which, the latter sells the goods and pays the proceeds into court, first deducting his costs, charges and expenses of sale. In one case, where all the parties were before the court, the unsuccessful claimant was ordered to pay at once the stakeholder's costs, and the chronometer which was in question was delivered to the successful claimant.⁹

Under an English Rule, which limits a master's jurisdiction to the costs of matters which are before him,¹⁰ it has been held, that where a stakeholder, who has been sued, applies for relief to the master, the master has only power over the costs of the interpleader application, and not over the costs of the action against the stakeholder, which is not before him.¹¹

Of action against stakeholder.—The stakeholder is entitled to his costs of the interpleader proceeding whether he has been sued or not,¹² and when one or both of the claimants have sued him, he is also entitled, out of the fund, to the costs of one or both actions as the case may be,¹³ and upon bringing into court the amount claimed, to deduct from it the amount of his taxed costs up to that period, the question on whom the ultimate liability shall fall being reserved.¹⁴ In New York the applicant must pay the costs of the action against him up to the time he interpleads.¹⁵

⁹ *Reeves v. Barraud* (1839), 7 Scott. 281.

¹⁰ Eng. Order, 54 Rule 12 (i).

¹¹ *Hansen v. Maddox* (1883), 12 Q. B. D. 100.

¹² *Clench v. Dooley* (1837), 56 L. T. 122.

¹³ *Agar v. Blethyn* (1835), 1 Tyr. & Granger, 160; *Pitchers v. Edney* (1835), 4 Bing. N. C. 721; *Gillespie v. Robertson* (1878), 14 U. C. L. J. 28; *M'Elheran v. London* (1886), 22 U. C. L. J. 28; *Armit v. Hudson Bay Co.* (1886), 3 Man. 529. But see *Regan v. Jones* (1841), 5 Jur. 607, and *Jones v. Regan* (1841), 9 Dowl. 580, where the stakeholder was allowed his costs of the action by the claimant who failed, but no costs of the action by the successful claimant. Under section 3 of the English Interpleader Act of 1831, the Court could only order costs between the stakeholder and the claimant who had sued, when the other claimant did not appear. In some early decisions therefore, the Court departed from the usual rule and made each party pay his own costs of the interpleader, and the stakeholder the costs of the action up to the commencement of the interpleader, *Lambert v. Cooper* (1837), 5 Dowl. 547; *Murdock v. Taylor* (1840), 6 Bing. N. C. 393, 8 Scott. 604.

¹⁴ *Searle v. Matthews* (1883), W. N. 176, 19 Q. B. D. 77, note.

¹⁵ *Sexton v. Home Fire Ins. Co.* (1898), 35 App. Div. N. Y. 170.

Sheriff's costs.—Immediately after the Interpleader Act became law in England in 1831, a rule was laid down, that the sheriff should pay his own costs of coming to the court, no matter how meritorious and proper his conduct might have been. The dignity of his office was thought a sufficient recompense for large pecuniary loss. It was said, that the Act, passed for his relief, conferred sufficient benefit upon him by allowing him to interplead, and so to relieve himself of a liability cast upon him by law. This rule was adopted, notwithstanding the fact, that the statute said distinctly that the costs should be in the discretion of the court.¹⁶ The rule was the same when a coroner interpleaded.¹⁷ But the sheriff was allowed his costs, if it appeared that the conduct of the parties had been vexatious or grossly improper,¹⁸ and was always allowed those incurred after the date of the interpleader order, including the costs of a final application.¹⁹

In course of time, the English Courts began to look with a more lenient eye upon the sheriff, and taking advantage of the discretion allowed by the interpleader statutes, it became the practice to direct the unsuccessful party to pay the sheriff's costs. It has been said in Ireland, that

¹⁶ *Barker v. Dynes* (1832), 1 Dowl. 169; *Bowdler v. Smith* (1832), 1 Dowl. 417; *Field v. Cope* (1832), 1 Dowl. 567; *Perkins v. Burton* (1833), 2 Dowl. 108; *Armitage v. Foster* (1835), 1 H. & W. 208; *Scales v. Sargeson* (1835), 4 Dowl. 231; *West v. Rotherham* (1836), 2 Bing. N. C. 527; *Beswick v. Thomas* (1837), 5 Dowl. 458; *Staley v. Bedwell* (1839), 10 Ad. & Ell. 145; *Ball v. Bruen* (1848), Bl. D. & O. 283; *Alexander v. Handy* (1848), 11 Ir. L. R. 328; *Deehan v. Lynch* (1850), 2 Ir. Jur. O. S. 15; *Cotton v. Cregan* (1855), 4 Ir. C. L. R. 250; *McCann v. Birch* (1878), 2 L. R. Ir. 500; *McCollum v. Kerr* (1862), 8 U. C. L. J. O. S. 71. In the Court of Exchequer the sheriff was allowed his costs: *Oram v. Sheldon* (1835), 3 Dowl. 640; *Gilhooly v. Grogan* (1853), 5 Ir. Jur. O. S. 244; and in a few other cases the rule was departed from: *Towgood v. Morgan* (1832), 3 Tyrw. 52 *note*; *Burke v. D'Arcy* (1847), 9 Ir. L. R. 287; *Scully v. Figgis* (1848), 13 Ir. L. R. 156; *Fitzgerald v. Coates* (1849), 1 Ir. Jur. O. S. 64; *Campbell v. Sweeney* (1873), 7 Ir. L. T. & Sol. J. 584.

¹⁷ *Phibbs v. Phibbs* (1851), 3 Ir. Jur. O. S. 96.

¹⁸ *Cox v. Fenn* (1838), 7 Dowl. 50; *Thompson v. Sheddon* (1835), 1 Scott, 697; *Lewis v. Eicke* (1834), 2 Dowl. 337.

¹⁹ *Bryant v. Ikey* (1832), 1 Dowl. 428; *Scales v. Sargeson* (1835), 4 Dowl. 231; *O'Callaghan v. Barnard* (1830), 3 Law Rec. O. S. 272; *McCollum v. Kerr* (1862), 8 U. C. L. J. O. S. 71.

both the makers of the law and its administrators, have at length begun to realize that modern sheriffs are generally poor men, to whom the dignity is a burden, and in recent decisions they have been more liberally dealt with.²⁰ This follows the practice of the Court of Chancery, where it was held, that the sheriff having done his duty was entitled to his costs out of the fund, and if that should be insufficient, to an order upon the claimants for the deficiency.²¹

By 1883, the practice had become quite settled, and in that year it was decided as follows: When an order is made on the application of a sheriff, he is entitled to his costs from the period at which he has been called into interpleading action; as against an unsuccessful claimant, to costs from the time of notice of the claim, or from the time of sale, whichever is first; and when a sheriff is ordered to withdraw, he is entitled to costs as against the execution creditor from the time at which the latter authorized the carrying on of the interpleader proceedings, which is generally from the return of the interpleader summons.²²

Statutory provision in Ontario.—In Ontario, in 1846, the legislature made provision for the payment of the sheriff's costs in interpleader as a matter of right. After an issue has been directed to be tried, the sheriff may tax his costs, and serve a copy of the certificate of taxation upon each of the parties to the issue. The successful party must then tax such costs as part of his costs of the cause, and upon receipt of them, pay them over to the sheriff, unless he has been previously made. If the successful party refuse to do this, the sheriff may then obtain an order, that the successful party shall himself pay them. If the parties to the issue compromise the matter, then the sheriff is paid by the execution creditor.²³

This provision has also been adopted in Manitoba, and when a claimant is barred, without the trial of an issue, the

²⁰ *Ex p. Streeter in re Morris* (1881), 19 Chy. Div. 216; *Malone v. Ross* (1900), 2 Ir. R. 598.

²¹ *Child v. Mann* (1867), L. R. 3 Eq. 806.

²² *Searle v. Matthews* (1883), W. N. 176, 19 Q. B. D. 77 *note*.

²³ Ont. Rule 1120.

proper order is, 'that the sheriff's costs be taxed to him, and an allocatur served on the execution creditor, that the latter add them to his costs, and upon receipt of them from the claimant, pay them over to the sheriff.' The sheriff is not entitled to them in the first instance from the execution creditor.²⁴

In Ontario since 1897, when an issue is directed to be tried, the costs of the sheriff incurred in consequence of the adverse claim, are made a first lien or charge upon the money or goods which may be found to be applicable upon the execution.²⁵ This in effect makes the execution creditor, who puts the sheriff in motion, always liable for his costs, but the creditor has his remedy over against the unsuccessful claimant.

When execution creditor abandons.—It was formerly the rule, when a sheriff had seized in obedience to the writ, and without any special instructions from the execution creditor, that the latter was not bound to determine what course he should adopt until the sheriff had interpleaded, and thus afforded him an opportunity of examining an affidavit from the claimant. The execution creditor could then withdraw and decline to take an issue, and was not liable to pay the costs of the sheriff. But where special instructions had been given to the sheriff to seize particular goods, the execution creditor could not then abandon after interpleader proceedings had been instituted without paying the sheriff's costs, nor was it necessary that special instructions should have been given in contemplation of an adverse claim. If special instructions were denied the sheriff was assumed to have acted under the writ.²⁶

Where a sheriff had seized without instructions in Manitoba, and the solicitor for the execution creditor wrote, after a claim had been made, intimating that the sheriff was entitled to interplead, and suggesting that he had better con-

²⁴ *Patterson v. Kennedy* (1884), 2 Man. 63.

²⁵ Rule 1120 (1).

²⁶ *Glasier v. Cook* (1885), 5 N. & M. 680; *C. v. D.* (1883), W. N. 207; *Prosser v. Mallinson* (1884), 28 Sol. J. pps. 411, 616; *Vanstaden v. Vanstaden* (1884), 10 Ont. Pr. 428; *Canadian Bank of Commerce v. Tasker* (1880), 8 Ont. Pr. 351.

sult his solicitor; upon the sheriff interpleading the execution creditor abandoned, and he was allowed to do so without paying the sheriff's costs.²⁷ But where a creditor knowing of a claim to be made, directed the sheriff to interplead, and on the return of the motion obtained an enlargement to enable him to examine the claimant, and then abandoned, he was directed to pay the sheriff's costs.²⁸

Creditor must instruct sheriff.—As a result of this practice the sheriff often found himself in a dilemma; having seized, and a claim having been made the execution creditor would frequently refuse to say whether he intended to admit or to dispute the claimant's title. The sheriff was thus obliged to interplead, and upon the creditor abandoning, had to pay his own costs. To clear the sheriff's course in such cases, it was enacted in England in 1889, that thereafter, upon a claim being made, the execution creditor should at the request of the sheriff admit or dispute the claim. If he admitted the title of the claimant he was only liable to the sheriff for fees and expenses incurred prior to the receipt of the notice admitting the claim. If on the other hand the execution creditor did not in due time admit or dispute the claim, and an interpleader went on, the court might make all such orders as to costs, fees, charges and expenses as might be just and reasonable.²⁹ The reasonable order, if the execution creditor abandons after proceedings have been instituted, is to make him liable for all costs down to the time he abandons, because the interpleader would have been unnecessary had he admitted the claim in the first instance. These English Rules were adopted in Ontario in 1893.³⁰

When execution creditor fails to appear.—If an execution creditor fails to appear after he has specially directed a seizure, or after he has requested the sheriff to interplead, or when he appears and subsequently consents to the sheriff's

²⁷ *Blake v. Manitoba Milling Coy.* (1891), 8 Man. 427.

²⁸ *Stephens v. Rogers* (1889), 6 Man. 298.

²⁹ Eng. Order 57, Rules 16 and 16 A.

³⁰ Ont. Rules (1897) 1115 and 1116.

withdrawal, as well as where, after a trial, the issue has been decided against him, he must pay the sheriff's costs of the interpleader application.³¹ Where the claimant succeeds all the execution creditors who take part in the issue are liable for the sheriff's costs.³²

In addition to his costs of the interpleader application, the sheriff is also entitled, where he has acted properly, to his costs of any action which the claimant may have brought against him, as where a claimant hastily followed up his notice with an action, and the sheriff applied promptly for relief by interpleader.³³ But the sheriff will have to pay the costs of the claimant's action, if he might have interpleaded before the action was brought.³⁴

If the claimant fail to appear.—If the claimant fail to appear upon the return of the interpleader application, or if he appear and do nothing to substantiate his claim, and is barred, he must pay the sheriff's costs.³⁵ He will also be liable for such costs, if, after the trial of an issue, it turns out that he is the unsuccessful party.³⁶ But a successful claimant will never be called upon to pay the sheriff's costs.³⁷

Execution creditor's liability to sheriff.—In addition to the rule that the party who fails must pay the sheriff's costs, whether he be the claimant or the execution creditor, there is a further practice under which the sheriff may in all cases ask his costs at once from the execution creditor, as the party who has put him in motion.³⁸ It is a reasonable rule that the sheriff is entitled to be made safe, and he has a right to say to the person who puts him in motion, pay me the amount of my costs. The strict form of order

³¹ *Bramsdon v. Parker* (1885), 1 Times Rep. 510; *Carter v. Stewart* (1877), 7 Ont. Pr. 85; *Manitoba v. Routley* (1886), 3 Man. 296; *Bank v. Emerson* (1878), 7 W. N. C. (Pa.) 392.

³² *Brown v. Portage La Prairie Mfg. Co.* (1885), 3 Man. 245.

³³ *Carter v. Stewart* (1877), 7 Ont. Pr. 85; *Macdonald v. Great N. W. Central Ry. Co.* (1894), 10 Man. 83.

³⁴ *Booth v. Preston* (1860), 3 Ont. Pr. 90.

³⁵ *Towgood v. Morgan* (1832), 3 Tyrw. 52 note; *Cochrane v. McFarlane* (1888), 5 Man. 120; *Showers v. Bull* (1888), 14 Victoria L. R. 219.

³⁶ *Searle v. Matthews* (1883), W. N. 176, 19 Q. B. 77, note.

³⁷ *Massey v. Gaudry* (1887), 4 Man. 220.

³⁸ *Hale v. Saloon Omnibus Co.* (1859), 4 Drew. p. 500.

therefore, when a claimant fails, is, that the costs shall be paid in the first instance by the execution creditor to the sheriff, and that the execution creditor shall have his remedy for them over against the unsuccessful claimant. This is the strict order which the sheriff is entitled to, although often he does not ask for it, but if the sheriff prefers the liability of the execution creditor he is entitled to it.³⁹ The words 'make such other orders as may appear just according to the circumstances' are wide enough to enable the court to direct in the original interpleader order, that the sheriff's costs shall be paid by the execution creditor, thus giving the sheriff a summary method of enforcing payment.⁴⁰

In Ireland the same principle is put in another way when it is said, that an interpleader order places the sheriff in the position of a plaintiff who has been held entitled to maintain a bill of interpleader, and who must therefore be indemnified in the first instance by the property, or by the person who establishes his right to it, against his costs. This rule applies to all costs incurred in reference to the subject matter, either before or after the order.⁴¹

After an interpleader order had been made directing an issue, the debtor's landlord made a claim for rent which the execution creditor did not meet, and the sheriff went out of possession. An order was then made discharging the issue, and directing the execution creditor to pay the sheriff's costs, half of which were to be repaid by the claimant.⁴²

Where an issue had been directed and the claimant, who was plaintiff, failed to bring it on for trial, an order was made barring the claimant, and the execution creditor was ordered to pay the sheriff's costs.⁴³

Where the result of the trial of an issue showed that the execution creditor had succeeded as to part of the goods,

³⁹ *Stern v. Tegner* (1898), 1 Q. B. 37; *Smith v. Darlow* (1884), 23 Chy. Div. 606; *Todd v. M'Keever* (1895), 2 Ir. R. 400; *Hall v. Bowerman* (1900), 19 Ont. Pr. 268.

⁴⁰ *Ashdown v. Nash* (1885), 3 Man. 37.

⁴¹ *Malone v. Ross* (1900), 2 Ir. R. 586.

⁴² *Lawson v. Carter* (1894), W. N. 6.

⁴³ *Bantock v. Cattley* (1893), Ont. Master in Chambers, not reported. See also *Stern v. Tegner* (1898), 1 Q. B. 37.

and the claimant as to the balance, and no costs of the issue were given to either party, an order was made at the request of the sheriff, directing that his costs should be paid by the execution creditor, and that one-half of these should be repaid by the claimant.⁴⁴ And where an execution creditor was plaintiff and succeeded, each party was ordered to pay his own costs, except that the sheriff's costs were to be paid by the execution creditor in the first instance, with the right of recovering them from the claimant.⁴⁵

Liability of execution debtor.—Sometimes the execution debtor has been ordered to pay the costs of the sheriff and other parties. Thus, after an issue had been directed between the execution creditor and a third party, the execution debtor appealed in the action and gave security, but eventually the execution creditor succeeded on the appeal and the debtor paid the judgment. It was held that the execution creditor and the execution debtor should each pay their own costs of the interpleader, and one moiety each of the costs of the sheriff and claimant.⁴⁶ But as a general rule the sheriff cannot look to the execution debtor for the interpleader costs.⁴⁷

Shareholder may lose his costs.—As a person entitled to relief by way of interpleader takes his costs out of the fund in his hands, he should be cautious to avoid burdening the fund to an extent beyond what his own protection may require, and being sure of his costs the court should be most careful not to allow him to run them up unnecessarily.⁴⁸

If, therefore, a stakeholder has acted improperly, as by delaying his application, and awaiting the suit of one of the claimants, but has nevertheless been allowed to interplead, he will be deprived of his costs of the interpleader suit or application, and in addition may be ordered to pay the costs

⁴⁴ *Ontario Silver Co. v. Tasker* (1893), 15 Ont. Pr. 180.

⁴⁵ *McCready v. VanValkenburg* (1893), Ont. McMahon, J., not reported.

⁴⁶ *McLaren v. Canada Central Ry. Co.* (1884), 10 Ont. Pr. 328.

⁴⁷ *Hammond v. Navin* (1841), 1 Dowl. N. S. 351. See also *Levy v. Davies* (1886), 12 Ont. Pr. 93.

⁴⁸ *Scottish Union Ins. Co. v. Steele* (1864), 9 L. T. N. S. 677; *Crawford v. Fisher* (1840), 1 Hare, 436.

of the action which the successful claimant has commenced, down to the time at which the interpleader order or decree was made. Vexatious conduct, or culpable negligence, on the part of the applicant in the prosecution of his suit, whereby needless expense is occasioned, ought to be visited in all cases with costs against him.⁴⁹

If the proceedings are irregular, in that the stakeholder does not pay the fund into court, he will be deprived of his costs out of the fund;⁵⁰ and if he proceeds with an interpleader suit, after one claimant has withdrawn, he will not be allowed any costs incurred after the notice of withdrawal.⁵¹

Stakeholder may have to pay costs.—If a person seeking relief fail to make out a case for interpleading his application or suit will be dismissed with costs.⁵² The court will not decree the costs to be paid by the claimant whose misconduct caused the suit.⁵³ And if a defendant, instead of demurring to a bill of interpleader bad on its face, puts in an answer, and goes on to a hearing, on a dismissal of the bill, he can only get costs up to the time he might have demurred.⁵⁴

Costs payable by sheriff.—As a general rule a sheriff will not be called upon to pay the costs of an interpleader application, unless it is shown that he has been guilty of improper conduct.⁵⁵ A claimant who has succeeded cannot therefore ask costs against the sheriff.⁵⁶ Nor is the sheriff liable to

⁴⁹ *Crawford v. Fisher* (1840), 1 Hare, 436; *Crickmore v. Freeston* (1871), 40 L. J. Chy. 137; *Searle v. Mathews* (1883), W. N. 176, 19 Q. B. D. 77 note; *Clougher v. Scoones* (1885), 3 Man. 238; *Churchill v. Welsh* (1878), 47 Wis. 39; *Michigan v. White* (1880), 44 Mich. 25.

⁵⁰ *Gardiner Savings Inst. v. Emerson* (1898), 91 Me. 535.

⁵¹ *Symes v. Magnay* (1855), 20 Beav. 47.

⁵² *Dungey v. Angove* (1789), 2 Ves. Jun. 303; *Bank of Montreal v. Little* (1870), 17 Grant, Ont., 685; *Merchants Bank v. Peters* (1884), 1 Man. 372; *Bedell v. Hoffman* (1830), 2 Paige, N. Y. 190. The same rule exists in Scotch multiplepoinding, *MacKenzie v. Sutherland* (1895), Ct. of Session, 22 R. 233.

⁵³ *Cochrane v. O'Brien* (1845), 8 Ir. Eq. R. 241.

⁵⁴ *Shaw v. Coster* (1840), 9 Paige, N. Y. 339.

⁵⁵ *Bland v. Delano* (1838), 6 Dowl. 293.

⁵⁶ *Morland v. Chitty* (1833), 1 Dowl. 520.

the execution creditor when the claimant does not appear.⁵⁷ And where an execution creditor intends to relinquish, he need not appear on the interpleader application, and if he do he is not entitled to costs.⁵⁸

But, if a sheriff comes to the court under circumstances which do not entitle him to relief, his application will be dismissed with costs, as where he has given up part of the goods.⁵⁹ It will generally be the case, that he is liable for the costs of only one of the parties. Thus, if relief is refused because the claim is clearly bad, as where the claimant alleged title under a bill of sale executed after the date of the seizure, the sheriff will be liable for the costs of the execution creditor only.⁶⁰

Where a sheriff acting under the writ, seized goods in the possession of the claimant, without special instructions from the creditor, and relief by interpleader was not granted, he was directed to pay the claimant's costs, but not those of the execution creditor, where it appeared that the latter did not repudiate the seizure.⁶¹

And where, pending an interpleader application, the sheriff withdrew at the request of the execution creditor, and did not notify the claimant, as he should have done, but brought both parties before the court, he was ordered to pay the costs of the claimant, but not those of the execution creditor; as also when his application was refused because he had acted in the interests of the execution creditor and under his direction.⁶²

The sheriff will be directed to pay the costs of the claimant's action, if he might have interpleaded before the action was commenced.⁶³

⁵⁷ *Philby v. Ikey* (1833), 2 Dowl. 222.

⁵⁸ *Glasier v. Cook* (1835), 5 N. & M. 680.

⁵⁹ *Braine v. Hunt* (1834), 2 Dowl. 391.

⁶⁰ *Re Sheriff of Oxon* (1837), 6 Dowl. 136; *Monitor Plow Works v. Allen* (1877), *Man. Temp. Wood*, 165.

⁶¹ *Bishop v. Hinxman* (1833), 2 Dowl. 166.

⁶² *Flynn v. Cooney* (1899), 18 Ont. Pr. 321; *Burleigh v. England* (1838), 1 Arnold, 106.

⁶³ *Booth v. Preston* (1860), 3 Ont. Pr. 90.

If a sheriff call a landlord before the court along with the execution creditor and claimant, when there is no dispute as to the rent, he will have to pay the landlord's costs of appearing.⁶⁴

Where a sheriff applied for relief, but it appeared that an attachment had been already obtained against him for not returning the writ, the court would only grant his application upon the terms of his paying the costs of the attachment.⁶⁵

Costs of further proceedings.—As a general rule, after a person has obtained his interpleader order or decree, it is not necessary for him to appear before the court again, and if he do so of his own motion, as upon an appeal, or on a final motion, he will not be awarded costs. If he is notified by one of the parties, such party may have to pay his costs of appearing. Where an interpleader order directed that a sheriff's costs should be paid by the claimant who was barred, and the claimant appealed, asking for a reversal of the order, and that the execution creditor should pay the sheriff, it was held that the sheriff was wrong in attending, as there was no suggestion that if the appeal were allowed the execution creditor would not be able to pay, and he was refused his costs.⁶⁶ But in another case, where it appeared that the sheriff would lose his costs, if the appeal were allowed, it was held that he had such an interest in the result as entitled him to attend, and he was allowed his costs of appearing on the appeal.⁶⁷

It is not necessary for the successful party to notify the sheriff of the final motion to bar the other party and for costs. If he do so, he will have to pay the sheriff's costs of appearing, without recourse to the unsuccessful party.⁶⁸ If, however, a matter affecting the sheriff's own costs is raised,

⁶⁴ *Clarke v. Lord* (1833), 2 Dowl. 55.

⁶⁵ *Alemore v. Adeane* (1835), 3 Dowl. 498.

⁶⁶ *Ex parte Webster in re Morris* (1882), 22 Chy. Div. 136.

⁶⁷ *Trickett v. Girdlestone* (1897), 103 Law Times Jr. 81; *Kilpatrick v. Gilliam* (1890), 16 Vict. L. R. 673.

⁶⁸ *O'Brien v. Bull* (1883), 9 Ont. Pr. 494.

he should be served with notice of the final order, but beyond that in ordinary cases, he has no interest in the proceedings, because the order provides how his costs shall be recovered. If he is needlessly served, he may be justified in attending, and in such case his costs will be borne by the party who brings him there.⁶⁹

Costs between claimants.—As between the two claimants, the rule in equity is, that the unsuccessful party will be ordered to pay the successful claimant's costs of the interpleader suit, of the action or issue directed, and also to make good to him the costs and charges which have been deducted from the fund by the stakeholder. The principle is, that the claimant who improperly raises the double claim must pay the costs occasioned by it.⁷⁰ And a claimant who does not appear, will be liable for these same costs and charges, just as though he had appeared and was barred.⁷¹ If there is no fund to pay into court, the claimant in the wrong must pay the costs of the stakeholder and of the innocent claimant.⁷²

With regard to costs between the claimants in proceedings under the Interpleader Acts, the course of practice has been to follow the rule of equity,⁷³ and to order the unsuccessful claimant to pay to the successful party, the amount deducted from the fund, or proceeds by the stakeholder for his costs and charges, as well as the successful claimant's

⁶⁹ *Gray v. Alexander* (1884), 10 Ont. Pr. 358.

⁷⁰ *Hendry v. Key* (1756), 1 Dick. 291; *Dowson v. Hardcastle* (1791), 2 Cox, 278; *Edensor v. Roberts* (1791), 2 Cox, 280; *Cowtan v. Williams* (1803), 9 Ves. Jun. 107; *Martinius v. Helmuth* (1815), 2 Ves. & B. 412; *Symes v. Magnay* (1855), 20 Beav. 47; *Laing v. Zeden* (1874), 9 L. R. Ch. App. 736; *Richards v. Salter* (1822), 6 John Ch. N. Y. 445; *Canfield v. Morgan* (1824), 1 Hopk. N. Y. 256; *Manchester v. Stimson* (1853), 2 R. L. 415; *Farley v. Blood* (1854), 30 N. H. 354; *Miller v. Watts* (1854), 4 Duer. N. Y. 203; *Miller v. DePeyster* (1885), 1 Abb. Ch. N. Y. 234. But see *contra Gardiner Savings Inst. v. Emerson* (1898), 91 Me. 535.

⁷¹ *Hodges v. Smith* (1787), 1 Cox. 357; *Wells v. Hews* (1876), 24 Gr. Ont. 131.

⁷² *Mason v. Hamilton* (1831), 5 Sim. 21; *Aldridge v. Mesner* (1801), 6 Ves. Jun. 418.

⁷³ *Melville v. Smark* (1841), 3 M. & G. 57.

costs of the interpleader application, of the issue, and of any subsequent proceedings.⁷⁴

When opposing claimants of personal property, subject to distribution, interplead each other, the administrator not being a party to the litigation, costs will not be allowed to the claimants out of the fund.⁷⁵

In Pennsylvania, upon interpleader over a fund paid into court by a benefit association, the costs of the whole litigation were taken out of the fund and the balance awarded to the rightful claimant.⁷⁶

When interpleader order rescinded.—Where an interpleader order directed an issue, and reserved the costs, and the defendant in the issue obtained an order for the discharge of the interpleader order unless the plaintiff should proceed in a certain time, which he failed to do, it was held that the order discharging the interpleader order did not discharge it entirely, and that jurisdiction still remained under which an order could be made that the defaulting party pay the costs.⁷⁷

When a claimant does not appear.—Under the English Interpleader Act as first enacted, and up to the codification of the practice in 1883, when it was amended, if a claimant did not appear on a stakeholder's application, the court was empowered to order costs between the stakeholder and the claimant who had sued him. During this period a claimant could not be ordered to pay costs when he did not appear,

⁷⁴ *Parker v. Linnett* (1834), 2 Dowl. 562; *Duear v. Mackintosh* (1834), 2 Dowl. 730; *Agar v. Blethyn* (1835), 1 Tyr. & Granger, 160; *Pitchers v. Edney* (1838), 4 Bing. N. C. 721; *Reeves v. Barraud* (1839), 7 Scott, 281; *Regan v. Jones* (1841), 5 Jur. 607; *Jones v. Regan* (1841), 9 Dowl. 580; *Rooda v. Gun Shot, Etc., Coy.* (1873), 28 L. T. N. S. 635; *Blaker v. Seager* (1897), 76 Law Times, 392; *Gillespie v. Robertson* (1878), 14 U. C. L. J. 28; *Clougher v. Scoones* (1885), 3 Man. 238; *Armit v. Hudson Bay Coy.* (1886), 3 Man. 529; *Shaw v. Weldon* (1884), 2 New Zealand L. R. 395.

⁷⁵ *Estate of Kirkendall* (1877), 43 Wis. 167; *Gardiner Savings Inst. v. Emerson* (1896), 91 Me. 535.

⁷⁶ *North Western Masonic Aid Association v. Marshall*, 10 C. C. Pa. 270.

⁷⁷ *Wicks v. Wood* (1878), 26 W. R. 680.

or when he appeared merely to object to an irregularity.⁷⁹ In Manitoba, where a claimant does not appear, or appears and abandons, no costs are awarded against him, but if he appear and asserts a claim, which he fails to prove or support, he must pay costs.⁸⁰

Successful execution creditor.—The successful execution creditor in a sheriff's case is entitled to his costs from the claimant, as where the latter has failed to appear, or has given notice that he will not proceed, or has failed after the issue has been tried out.⁸¹

The costs of a successful execution creditor should come out of the proceeds of the goods, if they cannot be collected from the claimant, and in an equitable view may be taken to be costs of the execution, for they are a disbursement necessary in working out the execution, and it is by their disbursement that the fund is preserved for all the creditors who are interested.⁸²

Claimant in sheriff's cases.—The successful claimant in a sheriff's interpleader, is generally entitled to his costs from the execution creditor, as where the latter does not appear, or abandons, or consents to be barred, or is fairly beaten on the trial of the issue.⁸³ If there are several issues with different execution creditors, the claimant is entitled to his costs of the interpleader application and final motion from

⁷⁹ *Jones v. Lewis* (1841), 8 M. & W. 264; *Grasebrook v. Pickford* (1842), 2 Dowl. N. S. 248, 10 M. & W. 279; *Rooda v. Gun Shot, &c., Coy.* (1873), 28 L. T. N. S. 635.

⁸⁰ *Armit v. Hudson Bay Co.* (1886), 3 Man. 529.

⁸¹ *Bowdler v. Smith* (1832), 1 Dowl. 417; *Perkins v. Burton* (1833), 2 Dowl. 108, 3 Tyrw. 51; *Towgood v. Morgan* (1832), 3 Tyrw. 52, note; *Wills v. Hopkins* (1835), 3 Dowl. 346; *Oram v. Sheldon* (1835), 3 Dowl. 640; *Armitage v. Foster* (1835), 1 H. & W. 208; *Shuttleworth v. Clark* (1836), 4 Dowl. 561; *Burke v. Burke* (1878), 12 Ir. L. T. & Sol. J. 50 and 88. As against a married woman, *Nunn v. Tyson* (1901), 17 Times L. R. 624.

⁸² *Levy v. Davies* (1886), 12 Ont. Pr. 93. But see *Hammond v. Navin* (1841), 1 Dowl. N. S. 351.

⁸³ *Bryant v. Ikey* (1832), 1 Dowl. 428; *Seaward v. Williams* (1833), 1 Dowl. 528; *Tolminson v. Done* (1835), 1 H. & W. 123; *Beswick v. Thomas* (1837), 5 Dowl. 458; *Cusel v. Pariente* (1844), 7 M. & G. 527; *Carter v. Stewart* (1877), 7 Ont. Pr. 83; *Vanstaden v. Vanstaden* (1894), 10 Ont. Pr. 428; *Manitoba & N. W. Loan Coy. v. Runtley* (1896), 3 Man. 296; *Hyland v. Lennox* (1891), 23 L. R. Ir. 286; *Hogaboom v. Gillies* (1895), 16 Ont. Pr. 402.

all the creditors, but the costs of each issue will be borne by the defendant in that issue.⁵³

But where the execution creditor has not specially instructed the seizure, and abandons upon ascertaining the nature of the claimant's rights, he will not be ordered to pay the claimant's costs;⁵⁴ and as will presently appear, the court sometimes, in exercising its discretion, deprives a successful party of his costs.

Costs in discretion of court.—It has been held in some cases, that the costs of interpleader proceedings are awarded to the successful party as a matter of right, that upon the issue the costs always follow the verdict.⁵⁵ The weight of authority, however, gives effect to the practice that the costs are to be considered under the Interpleader Statutes, as being wholly within the control or discretion of the court.⁵⁶ Under the English practice the court may, in or for the purpose of an interpleading proceeding, make all such orders as to costs as may be just and reasonable.⁵⁷

If, after the return day of a sheriff's application, either party withdraws, the court may make all such orders as to costs, fees, charges and expenses as may seem just.⁵⁸

Under a New Zealand Statute, with respect to interpleader in a magistrate's court, it has been held, that the words "shall adjudicate upon such claim and make such orders between the parties in respect thereof and of the proceedings as to him shall seem fit," confer upon the magistrate power to award costs.⁵⁹

⁵³ *Brown v. Portage La Prairie Mfg. Co.* (1885), 3 Man. 245.

⁵⁴ *Swaine v. Spencer* (1841), 9 Dowl. 347; *Wilkins v. Pentman* (1877), 7 Ont. Pr. 84; *Canadian Bank of Commerce v. Tasker* (1880), 8 Ont. Pr. 351; *Prosser v. Mallinson* (1884), 28 Sol. J. p. 411, and 616; *Blake v. Manitoba Milling Co.* (1891), 8 Man. 427.

⁵⁵ *Bellhouse v. Gunn* (1861), 20 U. C. Q. B. 555; *Black's Appeal* (1884), 106 Pa. St. 344; *Jarrard v. Zook*, 1 W'r'd Pa. 406.

⁵⁶ *Massey v. Gaudry* (1887), 4 Man. 229; *Rigel's Appeal* (1890), 1 Walk. Pa. 72; *Peters v. Shaner* (1882), 1 Del. Pa. 252; *Miller v. Black*, 8 Kulp. Pa. 20; *Haubert v. Beckhaus* (1882), 18 W. N. C. Pa. 327.

⁵⁷ Eng. Order 57, Rule 15; Ont. Rule 1122.

⁵⁸ Eng. Order 57, Rule 17; Ont. Rule 1116.

⁵⁹ *McTaggart v. Hargreaves* (1885), 3 New Zealand L. R. 77.

Successful party deprived of costs.—Although the general rule is, that the successful party is entitled to his costs, still in some cases the court has exercised its discretion and refused to award costs to the successful party upon the trial of the issue;⁹⁰ or what is the same in effect, has ordered each party to pay his own costs.⁹¹ In one case, the claimant a chattel mortgagee having succeeded, the court remarking that no blame seemed to attach to the execution creditor, directed each party to pay his own costs.⁹² And it has been held in Ireland, that a successful claimant is not entitled to his costs, if the property seized was so placed that it might reasonably be supposed to belong to the execution debtor.⁹³

Where the claimants settled the matter out of court, the court refused to interfere to compel one claimant to refund, what the other had paid to the sheriff.⁹⁴

Rule in Pennsylvania.—In Pennsylvania, notwithstanding the general rule that a successful claimant in a sheriff's interpleader is entitled to his costs from the execution creditor,⁹⁵ it has been held, that the execution creditor is not liable for costs, when he has probable cause for the levy which amounts to more than a mere suspicion, when he has acted in good faith and without oppression and with reasonable cause, or where the goods were found in the possession of the debtor, and the creditor releases them as soon as the true title is disclosed.⁹⁶ And where the goods are in the joint possession of the debtor and his wife, there is always

⁹⁰ *Field v. Rivington* (1880), 5 T. L. R. 642; *Massey v. Gaudry* (1887), 4 Man. 229.

⁹¹ *Morland v. Chitty* (1833), 1 Dowl. 520; *Blake v. Manitoba Milling Coy.* (1891), 8 Man. 427; *Campbell v. Clevestine* (1892), 3 Dist. Rep. Pa. 166, 149 Pa. St. 46.

⁹² *Morland v. Chitty* (1833), 1 Dowl. 520.

⁹³ *Phibbs v. Phibbs* (1851), 3 Ir. Jur. O. S. 96.

⁹⁴ *Dunn v. Boulton* (1853), 2 Chamb. R. 193 (Ont.).

⁹⁵ *Craig v. Building Association* (1881), 10 W. N. C. Pa. 296; *Renninman v. Hood*, 5 Kulp. Pa. 251; *Shellenberger v. Fleisher*, 11 C. C. Pa. 36; *Auerbach v. Sartorius*, 14 C. C. Pa. 520.

⁹⁶ *Mansley v. Moore* (1874), 1 W. N. C. Pa. 268; *Haubert v. Bechaus* (1882), 13 W. N. C. Pa. 327; *Renninman v. Hood*, 5 Kulp. Pa. 251; *Eberly v. Aultman*, 12 Lanc. Pa. 275; *Kaas v. Beltney* (1882), 39 L. I. Pa. 226; *Cleaver v. Blaker*, 5 Montg. Pa. 172.

ground for a levy, and the costs will not be put upon the unsuccessful plaintiff in the execution.⁸⁷ But now by statute the costs follow the judgment, and are payable by the losing party.⁸⁸

Of action against stakeholder.—On the question, whether the unsuccessful claimant is also liable to the other claimant, for the latter's costs of his action, if any, against the stakeholder, and which has been stayed by the interpleader order or decree, there is a dearth of authority from Courts of Chancery. It has been held in Georgia, that the unsuccessful claimant cannot be charged with the costs of the other action to which he is no party.⁸⁹ Under the English Interpleader Act, it has been clearly laid down, that the unsuccessful claimant is liable for such costs as well, on the ground that but for his wrongful claim there would have been no such action.¹ But in a later case it has been held, that the words of the rule, 'in and for the purposes of the interpleader may make such orders as to costs as may be just and reasonable,' only gives jurisdiction over the costs of the interpleader proceeding, and not over the action which one of the claimants may have brought against the applicant.²

If a claimant hastily follow up his notice of claim with an action against the sheriff, and the latter interplead promptly, he will not have to pay the costs of the action.³

When success is divided.—When each party succeeds on an interpleader issue as to part of the goods, there should be a division of the costs, and the ratio of that division is for the court to determine, or the court may direct that each

⁸⁷ *Hess v. Bank* (1889), 46 L. L. Pa. 98. *Mitchell v. Jobes*, 11 C. C. Pa. 100.

⁸⁸ Pa. P. L. No. 80 of 1897.

⁸⁹ *Morgan v. Perkins* (1894), 94 Ga. 353.

¹ *Agar v. Blethyn* (1835), 1 Tyr. & Granger 160; *Regan v. Jones* (1841), 5 Jur. 607; *Jones v. Regan* (1841), 9 Dowl. 580.

² *Hansen v. Maddox* (1883), 12 Q. B. D. 100.

³ *Macdonald v. Great North Western* (1894), 10 Man. 83.

party shall bear his own costs.⁴ Neither is entitled to costs as of course, the award of costs is in the discretion of the court.⁵

When success is divided, the ordinary principle that the plaintiff shall have his general costs, does not apply. The costs should be taxed without reference to which is plaintiff and which defendant. The plaintiff will have his costs in respect to the matters as to which he has succeeded, and the defendant the costs necessary for setting up his case.⁶

Where £183 was claimed, of which the plaintiff in the issue only recovered £50, it was held a wise discretion to order each side to pay their own costs.⁷

On a sheriff's interpleader, where each party partially succeeded, the claimant was given the general costs of the issue, the costs of the interpleader application and of the final application, while the execution creditor was allowed to deduct the costs of the issues as to which he succeeded.⁸

A sheriff seized five horses of which the claimant established title to two. It was held a reasonable course to direct the master to look at the costs on both sides, to see how much each had incurred in making out his respective claim, and that one set should be balanced against the other. The claimant was allowed his costs prior to the direction of the issue, because it was right and necessary for him to appear, but no costs subsequent to the trial, because by claiming more than he ought, he forced the execution creditor to resist his claim.⁹

Where a claimant succeeded as to nearly all, he was allowed the costs of the interpleader motion and the general

⁴ *Burnham v. Walton* (1835), 2 Man. 180; *Dixon v. Yates* (1833), 5 B. & Ad. 313; *Soames v. Andridge* (1841), 9 Dowl. 654, cited *in arg.*; *Commings v. Kavanagh* (1891), 25 Ir. L. T. R. 24; *McVitty v. Crowley* (1891), 17 Victorian L. R. 508; *Harbison v. Gilleland* (1886), 2 C. C. Pa. 369; *Sterling v. Heath* (1888), 5 C. C. Pa. 12; *Shellenberger v. Fleisher*, 11 C. C. Pa. 86; *Grover v. Wolf*, 5 Kulp. Pa. 250.

⁵ *Cronin v. Cronin* (1886), 3 How. Pr. N. S. (N. Y.) 184.

⁶ *Clifton v. Davis* (1856), 6 Ell. & Bl. 392, 25 L. J. Q. B. 344.

⁷ *Carr v. Edwards* (1839), 3 Dowl. 29.

⁸ *Staley v. Bedwell* (1839), 10 Ad. & Ell. 145.

⁹ *Lewis v. Holding* (1841), 2 M. & G. 875.

costs of the issue, while the execution creditor was allowed to set off his costs occasioned by the defence of the goods he recovered.¹⁰

Where a claimant claimed all the goods seized, under a chattel mortgage, and at the trial it appeared that one-sixth of the goods were not covered by his mortgage, the claimant was given the general costs, subject to a deduction of one-sixth.¹¹

Where eight horses were seized and the claimant succeeded as to three, no costs of the proceedings before the issue were allowed, while the costs of the issue were apportioned.¹²

Where a claimant was entitled to about half of the goods seized, but claimed the whole, and the balance more than sufficed to answer the judgment debt, the claimant was ordered to pay all the costs occasioned by the interpleader.¹³

Where the claimant succeeds as to the bulk of the goods, he is entitled to his costs of the issue and of an appeal therefrom.¹⁴

Under the Pennsylvania Statute, which gives the execution creditor the costs, if upon the trial the title to the goods is found not to be in the claimant, it has been held, where a claimant succeeded as to all the goods in question except an iron safe worth \$7.50, that the execution creditor should nevertheless have his costs.¹⁵

Of taking fund out of court.—The party who succeeds has a right to his costs of applying to take the fund out of court, from the other claimant, or to his costs of applying to the court to obtain the property in question, where it has been held by the stakeholder awaiting a direction from the court. He is entitled to these costs, although he has not

¹⁰ *Dempsey v. Caspar* (1854), 1 Ont. Pr. 134.

¹¹ *Segsworth v. Meridan* (1863), 3 Ont. R. 413.

¹² *Riordan v. Polson* (1891), 1 N. S. Wales W. N. 53.

¹³ *Morrissey v. Tamworth* (1884), 1 N. S. Wales W. N. 16.

¹⁴ *Plummer v. Price* (1879), 39 L. T. N. S. 657.

¹⁵ *Hoerner v. Pine Grove Brewing Coy.* (1900), 8 Del. Co. R. 106 Pa.

applied to the other party for a consent to payment out or delivery.¹⁶

In Manitoba, however, it has been held, that the costs of obtaining money out of court must be borne by the party entitled to it, and not by the unsuccessful claimant.¹⁷

Security for costs.—The party substantially and in fact moving the proceedings, whether plaintiff or defendant in an interpleader issue, should, if resident out of the jurisdiction, give security to the opposite party for his costs.¹⁸

In equity, each defendant in a bill of interpleader, is in the nature of a plaintiff, in the cause sent for trial at law.¹⁹

Because a claimant is made plaintiff, and resides out of the jurisdiction, it does not necessarily follow that he should give security for costs, and when the defendant in the issue, is really interested in the result as a plaintiff, he is not entitled to call upon the absent plaintiff for security for costs.²⁰ A non-resident defendant will not be required to give security for costs, when the burden of proof is on the other party.²¹

In considering whether parties to interpleader proceedings ought to be required to give security for costs, the rules applicable to ordinary litigants ought to be observed. At the same time, in applying these rules, the question whether a party to an interpleader issue is to be treated as a plaintiff or as a defendant, must be decided by the real merits of the case, and not by the mere form of the issue itself. In some cases each party is as much a plaintiff as the other.²²

¹⁶ *Wills v. Hopkins* (1835), 3 Dowl. 346; *Barnes v. Bank of England* (1838), 7 Dowl. 319; *Meredith v. Rogers* (1839), 7 Dowl. 596; *Notwithstanding Bowen v. Bramidge* (1833), 2 Dowl. 213.

¹⁷ *Clougher v. Scoones* (1885), 3 Man. 238.

¹⁸ *Re Ancient Order of Foresters v. Castner* (1890), 14 Ont. Pr. 47; *Smith v. Hammond* (1833), 6 Sim. 10. *Note*—*Canadian Bank of Commerce v. Middleton* (1887), 12 Ont. Pr. 121, is now an authority, as the English Rule has been enacted in Ontario. See Rule 1122.

¹⁹ *Anon v. —* (1685), 1 Vern. 351.

²⁰ *Belmont v. Aynard* (1879), 4 C. P. D. 221, 352; *McPhillips v. Wolf* (1887), 4 Man. 301.

²¹ *Manufacturing Co. v. Gerhard* (1878), 7 W. N. C. Pa. 51.

²² *Rhodes v. Dawson* (1886), 16 Q. B. D. 548.

The substance and not the form of the proceeding must be looked at.²³

Where a claimant is substituted for the original defendant, under an interpleader order, he is entitled to call upon a foreign plaintiff for security for costs, he stands in the same position as any other defendant. The fact that the stakeholder, who was the original defendant, did not apply for security before interpleading, is no reason why the claimant substituted should not be allowed to do so.²⁴

Where the plaintiff in an issue, directed upon a stakeholder's application, is insolvent, he must give security for the costs of the defendant in the issue.²⁵

Where an action was directed instead of an issue in the name of a bankrupt trustee as plaintiff, the plaintiff's *cestui que trust* was ordered to give security for the costs of the defendant in the action.²⁶

Rule as to security in sheriff's cases.—In a sheriff's interpleader, the party out of the jurisdiction, whether claimant or execution creditor, may be ordered to give security for costs to his opponent in the issue. Both parties are actors, the one by his execution, the other by his claim. By his notice the absent claimant commences the litigation, even more than does the execution creditor by his writ. If either party had been left to sue the sheriff according as he had executed, or refused to execute the writ, he would have had to give security for costs. Whether plaintiff or defendant, the party out of the jurisdiction must give security for costs to his opponent. Therefore, the rule that a defendant shall not be compelled to give security for costs, does not apply to a defendant in a sheriff's interpleader issue. The court has a discretion, under the English practice, and may for the purpose of any interpleader proceeding, make all such orders as to costs and all other matters as may be just and

²³ *Tomlinson v. Land & Finance Corp'n* (1884), 14 Q. B. D. 539.

²⁴ *Benazech v. Beasett* (1845), 1 C. B. 313, 2 D. & L. 801.

²⁵ *Tanner v. European Bank* (1850), L. R. 1 Ex. 261. See also *Farley v. Pedlar* (1901), 1 Ont. 570; but see *contra Ridgway v. Jones* (1860), 29 L. J. Q. B. 97.

²⁶ *Frost v. Heywood* (1843), 2 Dowl. N. S. 301.

reasonable.²⁷ Sometimes each party may be directed to give security for his opponent's costs.²⁸

In an Irish case, both the claimant and the execution creditor being out of the jurisdiction, the court refused to compel the execution creditor, who was defendant in the issue, to give security for costs.²⁹

Although a non-resident may be required to give security for costs, he will not be required when an execution creditor to give security for damages.³⁰

How security is ordered.—In a proper case, security for costs may be directed by the order awarding an interpleader issue, or by a subsequent order, but until it is decided that there is to be an issue security cannot be ordered.³¹ The order should provide that the absent claimant give security, and in default that he be barred.³² An application for security for costs of an interpleader issue, made after the date of the interpleader order, must be styled not in the original cause but in the interpleader issue.³³

The same practice prevails in the Scotch action of multiplepoinding, the question 'is the process competent' is decided before security is required from a foreign claimant.³⁴

²⁷ *Tomlinson v. Land & Finance Corp'n* (1884), 14 Q. B. D. 539; *Knickerbocker Trust Coy. v. Webster* (1896), 17 Ont. Pr. 189. *Decisions in which an execution creditor has been ordered to give security*—*Williams v. Crossling* (1947), 4 D. & S. 660; *Lovell v. Wardroper* (1868), 4 Ont. Pr. 265; *Swain v. Stoddart* (1888), 12 Ont. Pr. 490; *Farr v. O'Neill* (1895), 15 Canada L. T. 390, Man.; *Belmont v. Norris, T. & H. Pr. Pa.* 907. *In an Irish case* *Gresham v. Kavanagh* (1874), 8 Ir. L. T. R. 8, the Court refused to order that an execution creditor out of the jurisdiction should give security. *Decisions in which the claimant has had to give security*—*Webster v. Delafield* (1849), 7 C. B. 187; *Hoban v. Munro* (1867), 2 Ir. R. C. L. 74.

²⁸ *Gray v. Alexander* (1884), 10 Ont. Pr. 358.

²⁹ *Workmeister v. Healy* (1876), 10 Ir. R. C. L. 450.

³⁰ *Belmont v. Norris, T. & H. Pr. Pa.* 907.

³¹ *Buchanan v. Campbell* (1890), 6 Man. 303.

³² *Ellis v. Cheesboro* (1894), 14 Canada L. T. Occ. N. 292 (N. W. T.).

³³ *McMaster v. Jasper* (1886), 3 Man. 605.

³⁴ *Clark v. Campbell* (1873), Ct. of Session, 1 R. 281; *North British Ry. Coy. v. White* (1881), Ct. of Session, 9 R. 97.

Effect of not giving.—If a party to an interpleader issue neglects to give security, when ordered to do so, his claim will be barred.²⁵

Where an execution creditor out of the jurisdiction was defendant in an issue, and neglected to give security, an order was made after the lapse of six months, that the money in court be paid out to the claimant unless security were given within fourteen days.²⁶

Security from the applicant.—In was held in England in 1850, that a stakeholder, a defendant in an action, could only have relief by interpleader upon giving security for the plaintiff's costs. Lord Campbell remarking, that the court could mould the rules according to the justice of each particular case, and that it would not be just that the plaintiff should be compelled to relinquish a substantial defendant without security,²⁷ and this decision has been followed in New South Wales.²⁸ In a later English case, however, it was decided that a stakeholder who was defendant in an action could not be asked to give security for the plaintiff's costs, merely because he asked to have substituted as defendant a third party who was insolvent.²⁹

Security for the applicant's costs.—Under an Ontario rule, which allows the court to do what is just and reasonable with regard to costs, it has been held that a claimant in insolvent circumstances may be compelled to give security for the applicant's costs, as was done in a sheriff's case where the execution creditor was insolvent. It was said to be just and reasonable that the creditor should be required to give security for the sheriff's costs, because he was actively seeking to enforce his claim to goods which had been seized in the possession of the claimant.³⁰

In Ontario, from 1865 to 1888, the Interpleader Act provided that the court might require either or both parties

²⁵ *Canadian Pacific Railway v. Forsyth* (1885), 3 Man. 45.

²⁶ *Melin v. Dumont* (1869), 17 W. R. 673.

²⁷ *Deller v. Prickett* (1850), 20 L. J. Q. B. 151.

²⁸ *Chisholm v. Richardson* (1876), 14 N. S. Wales, S. C. R. 334.

²⁹ *Ridgway v. Jones* (1860), 29 L. J. Q. B. 97.

³⁰ *Farley v. Pedlar* (1901), 1 Ont. 570.

to give security for the costs of the sheriff.⁴¹ But this provision did not place the sheriff in a more advantageous position than an ordinary party, and he was only entitled to security in a case similar to that in which a defendant in an action would be entitled to call for it. Where the claimant was a married woman and in financial straits the sheriff was refused security.⁴²

Before a sheriff, in Ontario, is obliged to seize goods in the possession of a third party claiming them, and not in the possession of the debtor, he must be furnished by the execution creditor with a bond, conditioned that the parties executing it will be liable for the costs and expenses which the sheriff or claimant may be put to, by the seizure or subsequent dealings with the property, including the interpleader suit, and which he may not recover from other persons who ought to pay the same. The bond is a bond of indemnity to the sheriff and his assigns, with two sufficient sureties, who must justify in double the supposed value of the property, such value to be stated in an affidavit attached to the bond to be made by the creditor, his solicitor or agent. If the sheriff is not satisfied with the bond offered, the matter in difference is settled by a judge following the practice on replevin bonds.⁴³

Charges of stakeholder in equity.—When the stakeholder who seeks relief is a wharfinger, or other person entitled to charges for the custody of the goods in question, such charges must be paid to him, as well as his costs of the interpleader suit or action.⁴⁴

Under Interpleader Acts.—Under the English Interpleader Act of 1831, the person seeking relief was obliged to

⁴¹ 28 Vict. c. 19, s. 2. *Gray v. Alexander* (1884), 10 Ont. Pr. 358.

⁴² *Sweetman v. Morrison* (1884), 10 Ont. Pr. 446. Although this provision was not embodied in particular words, in the Ontario codification of 1888, still, following the reasoning in *McLaughlin v. Hammill* (1892), 22 Ont. 498, it may still be considered in force. See Rule No. 1122 of 1897.

⁴³ R. S. Ontario 1897, c. 77, s. 22.

⁴⁴ *Dowson v. Hardcastle* (1791), 2 Cox. 278, 1 Ves. 368; *Eldon v. Roberts* (1791), 2 Cox, 280.

make an affidavit showing that he did not claim any interest in the subject matter.⁴⁵ It was at first held, that a wharfinger claiming a lien for his charges, could not have relief by interpleader, because of this provision, and because the lien attached only as against one of the claimants.⁴⁶ But two years later, the Bank of England was allowed to interplead in respect of certain bullion on which it had a lien for freight paid, for the reason, that a lien, as pointed out, was not a claim to an interest in the property itself, and besides in this case it attached against all the claimants.⁴⁷

Under the English Rules of 1883, the applicant in disclaiming interest in the subject matter, is allowed to except, "other than for charges or costs."⁴⁸ And considering this, and the rule which provides that the court may make all such orders as to costs and all other matters as are just and reasonable,⁴⁹ it has been held, that charges in the first rule mean charges which have relation to the subject matter, and the powers under the next rule, to make orders as to costs and all other matters, includes the stakeholder's charges.⁵⁰

In Ontario.—The Ontario Rules of 1897 are even more distinctly in favour of the stakeholder's lien for charges. He must satisfy the court that he claims no interest in the subject matter, other than in respect of a lien, or for charges or costs,⁵¹ and the court may make all such orders, respecting the satisfaction or payment of any lien or charges of the applicant, and as to costs and all other matters, as may be just and reasonable.⁵²

Liability of claimant.—A claimant who has failed in the interpleader issue, can only be called upon to pay the

⁴⁵ 1 & 2 Wm. IV., c. 58, s. 1.

⁴⁶ *Braddick v. Smith* (1832), 9 Bing. 84, 2 M. & S. 131.

⁴⁷ *Cotter v. Bank of England* (1834), 2 Dowl. 728.

⁴⁸ Order LVII. of the Rules of 1883, Rule 2 (a).

⁴⁹ Rule 15 of 1883.

⁵⁰ *De Rothschild v. Morrison* (1890), 24 Q. B. D. 750.

⁵¹ Rule 1104 (a).

⁵² Rule 1122.

charges of a wharfinger, from the time when he first interfered with the successful claimant's rights.⁵³

If there is a dispute as to the amount of the charges, which a carrier is entitled to deduct for freight and warehouse rates, the question of amount, it has been decided in India, ought to form the subject of a separate proceeding between the adjudicated owner and the person who seeks to make the goods liable.⁵⁴

Possession expenses of sheriff.—When a sheriff seizes goods, and they are claimed by a third party, the process of the execution is delayed, and extra expense in the shape of possession money is incurred. It is a reasonable rule that the sheriff must be reimbursed.⁵⁵ In considering this subject, it is usual to divide the expense into what is incurred before the interpleader order is made, and that incurred subsequently.

The usual form of interpleader order provides, that upon the claimant giving security, in the value of the goods or the amount of the execution, whichever is least, and upon paying to the sheriff his possession money from the date of the order the sheriff withdraws, or failing security, the sheriff sells and pays the proceeds into court, after deducting the expenses of sale, and his possession money from the date of the order.⁵⁶

After an interpleader order is made, the special jurisdiction of the court in interpleader arises, by which the writ of execution as such ceases to operate, and the sheriff in selling the goods, acts not for the execution creditor, but for the court under the interpleader order. The sheriff's

⁵³ *De Rothschild v. Morrison* (1890), 24 Q. B. D. 750.

⁵⁴ *Bombay, etc., Ry. Coy. v. Sassoon* (1893), 18 Bombay, 231.

⁵⁵ *Smith v. Darlow* (1884), 26 Chy. Div. 650; *Langton v. Horton* (1841), 3 Beav. 464.

⁵⁶ *Keeler v. Hazelwood* (1884), 1 Man. 31; *Scales v. Sargeson* (1835), 4 Dowl. 231; *Yates v. Meehan* (1860), 11 Ir. C. L. R. App. 1.; *McCollum v. Kerr* (1862), 8 U. C. L. J. O. S. 71; *Marquis of Lansdowne v. Bradshaw* (1842), Bl. D. & L. 13. But see *Underden v. Burgess* (1835), 4 Dowl. 104, where the possession money was to commence a week after the date of the order.

possession money from the date of the order, and the expenses of sale, represent his actual disbursements in carrying out the directions of the court as its officer. These he should be allowed to retain, subject to any moderation. The success of the claimant does not justify an order upon the sheriff to refund these expenses, because the claimant by not giving security has accepted a sale as the other alternative imposed by the court. If the claimant succeeds his proper remedy is to recover them from the execution creditor.⁵⁷

If, after an order has been made, the sheriff delay selling at the request of the execution creditor, so that the claimant may have further time, and the sheriff is unable to sell at all, and the issue is determined in the claimant's favour, the court will, on the sheriff's application, make the creditor pay the sheriff's possession expenses.⁵⁸

Rule in Ireland.—In a recent Irish case the law is laid down as follows: An order to interplead is never made except in the presence of the judgment creditor and the claimant. If the latter do not attend his claim is barred. If the former do not attend the sheriff is ordered to withdraw from possession. In neither case is there any additional expense for keeping the goods. But where an order to interplead is made, the claimant is at liberty to elect between having the goods sold at once, or getting possession of them on giving security. For an obvious reason, he generally takes the second alternative, and therefore the order is so drawn as to give him a certain period to procure the necessary security. It often happens that he does not do so until the last moment, and occasionally he fails to do so altogether, in which case the sheriff sells under the order of the court. The question naturally arises, who pays for keeping

⁵⁷ *Reid v. Murphy* (1887), 12 Ont. Pr. 338 (overruling *Ontario Bank v. Revell* (1880), 11 Ont. Pr. 249); *Bland v. Delano* (1838), 6 Dowl. 293; *Armitage v. Foster* (1835), 1 H. & W. 208; *Keeler v. Haslewood* (1884), 1 Man. 31; *Patterson v. Kennedy* (1884), 2 Man. 68; *Clark v. Chetwode* (1836), 4 Dowl. 635. See *contra* rule in Pa., *Commonwealth v. Sides*, 12 Lanc. Pa. 145.

⁵⁸ *Re Creagh* (1890), 11 N. S. Wales L. R. 16.

the goods from the date of the order till security is completed or sale? Surely, the reasonable answer is, the claimant, for whose benefit and at whose request the goods are kept. This would be quite irrespective of the interpleader suit. The claimant causes the court, which would otherwise direct them to be sold at once, to order the sheriff to retain them for the claimant's benefit. The practice has been to give the sheriff his costs of possession out of the proceeds of the sale, if the fund is brought into court, and if not, against the claimant even where he succeeds. The latter may be entitled to have such costs included in the costs awarded him against the judgment creditor, but this does not follow as a matter of course. If the judgment creditor succeeds, the sheriff retains the amount out of the proceeds as part of the costs of the levy, and if the judgment debt is not fully discharged by the amount realized, the judgment creditor would in most cases, be entitled to have an order for the costs so deducted against the claimant.⁵⁰

Sheriff's right against creditor.—A sheriff has always a right to say to the execution creditor who puts him in motion, pay me the amount of my proper charges. The strict form of order will be, when a claim by a third person fails, that the charges shall be paid in the first instance by the execution creditor, who shall have them over against the third party. This is the strict order which the sheriff is entitled to, although often he does not ask for it, but if the sheriff has no faith in the solvency of the claimant, and prefers the liability of the execution creditor, he is entitled to it.⁵¹ And if an execution creditor is barred, after an issue has been directed, he must pay the sheriff's possession money and expenses occasioned by the sale.⁵²

A sheriff is entitled to such possession and sale expenses as he may incur, in dealing with the subject matter, at the

⁵⁰ *Malone v. Ross* (1900) 2 Irish R. 586; *Taaffe v. Tyrrell* (1862), 14 Ir. C. L. R. App. XXVII.

⁵¹ *Smith v. Darlow* (1884), 28 Chy. Div. 605.

⁵² *Manitoba & N. W. Land Coy. v. Routley* (1896), 3 Man. 296.

request of the parties after an interpleader order is made, to be paid by the party in the wrong.⁵²

Expenses before the date of the order.—The possession money before the date of the order is regarded as part of the expenses of executing the writ, which would have been incurred just the same, even if the claimant had not appeared. This is the reason why the claimant is not burdened with these charges at all. The amount of them can be added to the sum to be levied, but this will not give the sheriff a right to levy for more than the possession money payable in respect of the ordinary possession in executing the process.⁵³ The date of the order, however, has not always been the dividing point. In an early case in England, the date was a week after the order, because it was said that in the ordinary course the sheriff would have to give that length of notice before selling.⁵⁴ While in a modern case, the sheriff was held entitled to possession money, as against an unsuccessful claimant, from the day the latter gave notice of his claim.⁵⁵

Sheriff deprived of possession money.—If a sheriff acts improperly, as where he takes a wrong proceeding, or holds the goods after he should have delivered them, and extra possession money is thereby incurred, he will not be allowed such expense. Thus, a sheriff was held not entitled to possession money for keeping possession during a period, while he was applying to a forum which had no jurisdiction to entertain his application.⁵⁶

A sheriff seized on the 14th of September, and an interpleader order was made directing him to sell. On the 16th the official receiver notified him that a receiving order had been made against the debtor, and on the 17th demanded the goods, which the sheriff refused to give up. The claimant afterwards withdrew his claim, the interpleader order

⁵² *Dabbs v. Humphries* (1835), 3 Dowl. 377.

⁵³ *Smith v. Darlow* (1884), 28 Ch. Div. 606; *Massey v. Gaudry* (1887), 2 Man. 229.

⁵⁴ *Underden v. Burgess* (1835), 4 Dowl. 104.

⁵⁵ *Searle v. Matthews* (1883), W. N. 176, 19 Q. B. D. 77 note.

⁵⁶ *Clark v. Chetwode* (1886), 4 Dowl. 635.

was discharged, and the sheriff gave the goods to the receiver, but he was only allowed possession money up to the 17th.⁶⁷ An interpleader order directed the sheriff to withdraw upon the claimant paying his possession money. The sheriff claimed possession money before the date of the order, and also charges for a second man in possession. Upon a motion by the claimant, for an attachment against the sheriff for extortion, it was held that the claim was not extortion under the Act of Elizabeth, but a ground for relief on taxation of costs.⁶⁸

Bound by what the order allows.—A sheriff has no rights to possession money, except what is given to him under the interpleader order. And where the sheriff was ordered to deliver the goods to the claimant on payment of his possession money, but in addition charged for the keep of horses which were under seizure, it was held that this charge for keep, did not come within possession money under the order. His course was to have applied for these expenses when the parties were before the court. If they were proper they would have been allowed, and it was said, they might still be allowed when the matter should be finally disposed of, but in the meantime the question was, what does the order direct?⁶⁹

Amount of the possession money.—The amount of possession money per day, which a sheriff may ask for, is the reasonable expenditure which may be necessary under the circumstances of each case. It has been held that \$2 a day is too much for a sheriff to pay to a bailiff who simply locks the store and carries the key.⁷⁰

It has been held in Ireland, that the sheriff should give the court information verified by affidavit, of the amount of expenses incurred, up to the date of the final order.⁷¹

⁶⁷ *In re Harrison* (1898), 2 Q. B. 111.

⁶⁸ *Long v. Bray* (1842), 10 W. R. 841.

⁶⁹ *Gaskell v. Sefton* (1845), 14 M. & W. 802. As to the keep of horses in Pennsylvania; see *Landis v. Bear*, 8 Lanc. Pa. 41, and in Ireland, *Malone v. Ross* (1900), 2 Ir. R. 586.

⁷⁰ *Grant v. Grant* (1883), 10 Ont. Pr. 40; *Malone v. Ross* (1900), 2 Ir. R. 586.

⁷¹ *Plunkett v. Kearney* (1876), 10 Ir. L. T. & Sol. J. 47.

When sheriff holds goods pending trial.—In Ontario, when the property in question remains pending the trial of the issue in the custody of the sheriff, the court may make an order for the payment to him of such sum for his trouble in and about the custody of the property as may be reasonable, and he is entitled to a lien upon the property to secure the payment, in case the issue is decided against the claimant.⁷³ This will be in the nature of poundage, and in addition to his possession expenses during the period.

Between creditor and claimant.—As between the execution creditor and the claimant, the practice is, that the execution creditor whether he succeeds or fails must pay the possession money from the seizure up to the date of the interpleader order, and that the claimant must bear them from the date of the order.⁷³ If the creditor succeed he will add these to the amount of his levy, in which case they are borne by the execution debtor.

In Pennsylvania, the claimant pays the costs of appraisal, if the debtor was in possession, otherwise the execution creditor pays.⁷⁴

If the order is not made on the first day upon which the sheriff brings the parties before the court, and enlargements take place, it is the reasonable practice to make the party asking the enlargement liable for the possession expense during such period.

When a claimant succeeds, he is entitled to be repaid by the execution creditor, the sheriff's possession money which he has advanced; or where there has been a sale, the successful claimant is entitled to recover from the execution creditor the possession money and expenses of sale which have been deducted from the proceeds of the goods by the sheriff.⁷⁵

⁷³ Ont. Rule 1121

⁷⁴ Gaskell v. Sefton (1845), 14 M. & W. 802.

⁷⁵ Pa. P. L. No. 80 of 1897.

⁷⁶ Goodman v. Blake (1887), 19 Q. B. D. 77; Reid v. Murphy (1887), 12 Ont. Pr. 338; Blaker v. Seager (1897), 76 Law Times 392; Cummins v. Kavanagh (1891), 25 Ir. L. T. R. 24.

When the execution creditor succeeds, he is entitled, in the same way, to have the possession money from the date of the order, deducted by the sheriff, made good by the claimant, but not the expenses of sale.

Scale of costs.—In Ontario it was enacted in 1886, that thereafter when a sheriff had two or more County Court executions in his hands he was bound to make his interpleader application in the County Court, and the costs of all proceedings were upon the County Court scale.¹⁶ But where a sheriff interpleads in the High Court, and has executions both from the County Court and from the High Court, a successful claimant is entitled to his costs on the High Court scale against a County Court execution creditor.¹⁷

It was held in England, when interpleader bills were in vogue, that a rule which gave costs on the lower scale in certain named cases, and generally in all other cases where the estate or fund to be dealt with was under the amount or value of £1,000, included in its general words an interpleader bill.¹⁸

In Ontario, when a sheriff interpleads in the High Court, and the issue is sent for trial to the County Court or Division Court, the sheriff is entitled to his costs on the High Court scale, and the other parties to the proceedings will also have their costs on the High Court scale up to the time the interpleader order is made, while the costs of the issue will be on the lower scale. The rule being, that the scale of costs after the order directing an issue, must be determined by the scale applicable to the forum in which the issue has to be tried, and before the issue on the scale

¹⁶ 49 Vict. (Ont.), c. 16, s. 3; Ont. Rules 1123 and 1128. Prior to 1886 it was held, that if a sheriff with County Court Writs, interpleaded in the High Court, his costs were on the County Court scale, but the costs of the issue were on the High Court scale, see *Masuret v. Lansdell* (1879), 8 Ont. Pr. 87, *Phipps v. Beamer* (1879), 8 Ont. Pr. 181.

¹⁷ *Phipps v. Beamer* (1879), 8 Ont. Pr. 181.

¹⁸ *Gibbs v. Gibbs* (1868), 4 Jur. N. S. 371.

of the court to which the sheriff is compelled to resort for relief."⁹

If the issue is one which may be sent, upon an interpleader application in the High Court, to a County Court or a Division Court for trial, and neither party asks to have it so tried, High Court costs will be given against the unsuccessful party. If neither party objects to the forum, it is too late for the unsuccessful party after the trial to say that he should only pay costs on the lower scale. He must be taken to have chosen his tribunal with its advantages and burdens."¹⁰

Under the English County Court Act there are three scales of costs according to the value of the subject matter £10 to £20, £20 to £50, and over £50. A claimant paid into court £36 to cover the amount of the execution and costs. The judge found in favour of the claimant and valued the goods at £51, and awarded him £10 damages in addition. It was held that the scale was not determined by the amount paid in, but by the value as assessed by the County Court Judge."¹¹

Costs of the day.—The costs of the day, when one party has not proceeded to trial according to the notice given, have sometimes been directed to stand until the termination of the proceedings;¹² and in other cases have been ordered to be paid forthwith.¹³

Power of trial judge over costs.—Under the English practice, the court or judge who tries the issue may now finally dispose of the interpleader proceedings, including all costs not otherwise provided for.¹⁴ It has been held in Ontario, that under this rule, the costs of an issue should

⁹ Ont. Rule 1128; *Christie v. Conway* (1888), 9 Ont. Pr. 529; *Arkell v. Geiger* (1888), 9 Ont. Pr. 523.

¹⁰ *Christie v. Conway* (1888), 9 Ont. Pr. 529; *Frost v. Lundy* (1894), 14 Can. L. T. Occ. N. 191 (Man.). See contra *Beatty v. Bryce* (1892), 9 Ont. Pr. 320.

¹¹ *Studham v. Stambridge* (1895), 1 Q. B. 870, 15 R. 406.

¹² *Hood v. Bradbury* (1844), 6 M. & G. 981; *Salter v. McLeod* (1864), 10 U. C. L. J. O. S. 299.

¹³ *Kimberley v. Hickman* (1846), 1 Saunders & Cole 90.

¹⁴ Eng. Order 57, Rule 12; Ont. Rule 1114.

not be reserved to be disposed of in chambers, the proper practice being, to leave the costs to be dealt with by the trial judge in his discretion, or in accordance with the jury's finding.⁸⁶

Effect of a judgment for costs.—Whether a claimant in interpleader, who has succeeded and taxed his costs under an order in the interpleader proceedings, is to be considered as a judgment creditor within the garnishee clauses of the English Common Law Procedure Act of 1854, and so entitled to attach a debt due to his debtor, was in 1861 answered in the affirmative,⁸⁷ and in 1873 in the negative.⁸⁸

An unsuccessful claimant was ordered to pay costs, and after examination as a judgment debtor, an order to commit was made for a refusal by the claimant to answer questions touching his property. It was held in Ontario, that an objection was too late, which asserted that a rule which gave a judgment creditor for costs only a right to examine the debtor touching his estate, did not apply to interpleader proceedings.⁸⁹

When costs can be set off.—An execution creditor sued two parties and obtained a judgment and execution against one only, he discontinued as against the second who taxed his costs. A sheriff then seized goods under the execution which the successful defendant claimed. The sheriff interpleaded, and in the issue the claimant failed and was ordered to pay the execution creditor's costs. It was held that the costs between the two parties could not be set off, because they were not costs in the same proceeding, the action and the interpleader application being different proceedings. They were not within the rule, where a party entitled to recover costs is liable to pay costs to any other party, the taxing officer may adjust by set off.⁹⁰

Sheriff's poundage.—The sheriff's right to claim poundage from the proceeds of goods seized, depends on the

⁸⁶ *Grothe v. Pearce* (1898), 15 Ont. Pr. 432.

⁸⁷ *Hartley v. Shemwell* (1861), 30 L. J. Q. B. 223.

⁸⁸ *Best v. Pembroke* (1873), L. R. 8 Q. B. 363.

⁸⁹ *McKinnon v. Crowe* (1896), 17 Ont. Pr. 291.

⁹⁰ *Barker v. Hemming* (1881), 43 L. T. N. S. 673.

legality of the seizure. The sheriff therefore must pay the proceeds into court, suspending his claim to poundage until after the trial of the interpleader issue. If the execution creditor succeeds the sheriff will be allowed poundage, if the claimant succeeds he will not.⁹⁰ If the execution creditor succeeds as to part of the goods in question, the sheriff will be allowed poundage on the value found in the creditor's favour.⁹¹

In Ontario, if the sheriff seize the goods of a judgment debtor, but for any reason do not sell, he is still entitled to his poundage, or such less sum as may be deemed reasonable.⁹² *Prima facie* the sheriff is entitled to full poundage, and the onus is on the execution creditor to show that a less sum is reasonable.⁹³ This rule does not interfere with the general practice, that the sheriff cannot have poundage when the goods seized and sold are afterwards found to be the goods of the claimant. In such cases the sheriff does not seize the goods of a judgment debtor and so the rule does not apply.⁹⁴ In an ordinary case, where the sheriff has not sold, and there has been no particular risk or responsibility, one-third of the full poundage is usually allowed.⁹⁵

Costs between claimants stand till issue tried.—The general practice, when an interpleader order is made, is to reserve the question of costs as between the claimants until after the trial of the issue.⁹⁶ And where the applicant has been allowed to deduct his costs and charges from the fund, or from the proceeds of the goods in the first instance, the

⁹⁰ *Barker v. Dynes* (1832), 1 Dowl. 169; *Turner v. Crozier* (1891), 14 Ont. Pr. 272.

⁹¹ *Marquis of Lansdowne v. Bradshaw* (1847), Bl. D. & O. 173; *Ontario Silver Co. v. Tasker* (1898), 15 Ont. Pr. 180.

⁹² Ont. Rule 1190 (1).

⁹³ *Morrison v. Taylor* (1882), 9 Ont. Pr. 393.

⁹⁴ *Turner v. Crozier* (1891), 14 Ont. Pr. 272.

⁹⁵ *Heathley v. Willard* (1894), Ont. Winchester, Master, not reported.

⁹⁶ *Hood v. Bradbury* (1844), 6 M. & G. 861; *Salter v. McLeod* (1864), 10 U. C. L. J. O. 8. 299.

question on whom the ultimate liability shall fall is also reserved."⁷

Where order for costs made.—Where an interpleader has been heard by a judge in chambers, the court has no jurisdiction as to costs, the application to have them disposed of must be made in chambers before the same judge.⁸ In Ontario, it has been held that it is not necessary to go to the same judge, but that any judge in chambers will do.⁹

The successful party applies for his costs on an affidavit entitled in the original cause to the tribunal which directed the issue.¹

A successful claimant is entitled to his final order for costs, notwithstanding the fact that the other claimant has served notice of appeal, as an application to stay the execution can still be made.²

The plaintiff in a bill of interpleader, if his right to relief is not disputed, has his costs out of the fund at once, but if one of the defendants claim that the bill does not show a case for interpleading, the plaintiff cannot then move for his costs, but must set down the case for a hearing.³

Rule when new trial.—The general rule as to costs, applies as well to trials of interpleader issues as to other cases. When a new trial of an interpleader issue is rendered necessary by the miscarriage of the jury, without the fault of either claimant, the general rule prevails, and a new trial will only be granted upon payment of costs.⁴

But if it appears that the first verdict has been obtained by fraud or perjury, the costs of the first trial will be directed to abide the event of the second.⁵

⁷ *Searle v. Matthews* (1888), W. N. p. 176; 19 Q. B. D. 77 *note*.

⁸ *Burg v. Schofield* (1842), 2 Dowl. N. S. 261; *Marks v. Ridgway* (1847), 1 Ex. 8; *Commercial v. Clark* (1885), 1 Ont. Pr. 270.

⁹ *Sewell v. Buffalo, Brantford & Goderich Ry. Co.* (1850), 3 J. C. L. J. O. S. 29; 2 Ont. Pr. 56.

¹ *Elliot v. Sparrow* (1885), 1 R. & W. 370.

² *Wilson v. Wilson* (1878), 7 Ont. Pr. 407.

³ *Jones v. Gilham* (1818), Cooper 49.

⁴ *Janes v. Whitbread* (1851), 11 C. B. 406.

⁵ *Gillingham v. Stuart* (1851), 11 C. B. 418, *cited in Arg.*; *Tyson v. Willis* (1851), 11 C. B. 418, *cited in Arg.*

CHAPTER XIV.

APPEALS.

Two classes of appeals.—Appeals in interpleader are naturally divisible into two classes; first, those in which the person seeking relief is interested as against one or both of the claimants, or in which one or both of the claimants allege that something is wrong in the order or judgment obtained by the stakeholder or sheriff; and secondly, those in which the claimants alone are interested, as between themselves, and with which the applicant has no concern.

Appeals always statutory.—As an appeal is a favour extended to a defeated litigant who is dissatisfied with the result, it follows, that a decision is final unless some statutory authority allows an appeal.¹ In some jurisdictions the interpleader statute in force contains a provision which permits an appeal, or which excludes the right to carry the matter higher, by declaring that the order or judgment is final, or that no appeal shall lie.²

General provisions.—It frequently happens, however, that there is no special provision at all with regard to appeals in interpleader, and the question then arises—Does some general provision apply? In determining this it becomes necessary to examine, somewhat closely and perhaps

¹ *Atty.-Genl. v. Sillem* (1864), 10 H. L. Ca. 704; *White v. Rech* (1865), 171 Pa. St. 82; *Long v. McDougall* (1885), 3 Man. 685. In Scotch multiplepointing see *Dumbreck v. Stevenson* (1861), Ct. of Session, 23 D. (H. L.) 1.

² See *Regina v. Doty* (1856), 18 U. C. Q. B. 400; *Keane v. Stedman* (1861), 10 U. C. C. P. 485; *Re Turner v. The Imperial Bank* (1881), 9 Ont. Pr. 19.

narrowly, the quality and extent of an interpleader proceeding, to ascertain whether an interpleader proceeding can be fairly brought within the words of the general provision. This subject has already been considered, in dealing with the question—'Is an interpleader proceeding an action or a proceeding in an action?'

As a rule all statutory provisions relating to appeals, when in general terms, apply to orders or judgments made in interpleader matters.⁴ The words 'judgment in a cause or matter depending,' as construed by the Supreme Court of Canada, are held abundantly sufficient to include an interpleader issue and the matters in contestation therein.⁵ But, when a rule provides for an appeal in an action, it has been held, that the word 'action' does not include an interpleader proceeding, which is not an action but a proceeding in an action.⁶

Final or interlocutory.—A further test in interpleader appeals lies in considering, whether each of the several decisions which may be rendered in the course of interpleader proceedings, is in its nature final or merely interlocutory. If final, the appeal may be under one provision, and may be such as will end only in the court of last resort;⁷ if, on the other hand, the judgment or order is interlocutory, the appeal may be under another provision and may be limited, or there may be no appeal at all.⁸

In England the judgment on the trial of an interpleader issue must be appealed against as an interlocutory order or judgment, and not as equivalent to a final judgment in an action.⁹

⁴ See chapter x.

⁵ *Withers v. Parker* (1859), 4 H. & N. 810; *Williams v. Mercier* (1862), 9 Q. B. D. 337; *Cole v. Campbell* (1883), 9 Ont. Pr. 498.

⁶ *Hovey v. Whiting* (1888), 14 Canada S. C. R. p. 527.

⁷ *King v. Simmonds* (1845), 7 Q. B. p. 311; *Collis v. Lewis* (1887), 20 Q. B. D. 202; *McNair v. Audenshaw* (1891), 2 Q. B. 502; *Isbister v. Sullivan* (1888), 9 Canada L. T. 3; 16 Ont. 418. But see chapter x.

⁸ *Hovey v. Whiting* (1887), 14 Can. S. C. R. 515.

⁹ See *King v. Simmonds* (1845), 7 Q. B. 311.

¹⁰ *McAndrew v. Barker* (1877), 7 Chy. D. 701; *McNair v. Audenshaw* (1891), 2 Q. B. 502; *contra Hughes v. Little* (1886), 18 Q. B. D. 82.

In Canada the rule is the other way,¹⁰ although it has been held that the order which a sheriff obtains, is not in its nature final but interlocutory.¹¹

In Pennsylvania the verdict and judgment on an issue in a sheriff's interpleader, was formerly looked upon as final and conclusive,¹² but since 1897 new trials may be granted of issues, and judgments are subject to appeal.¹³

It sometimes happens that the same decree may be final as far as it affects one party, and interlocutory with regard to others. Thus, the decree which the plaintiff obtains upon a bill of interpleader, is final so far as he is concerned, as it enables him to completely withdraw from the contest;¹⁴ but, as it requires the defendants to litigate their claims in further proceedings, is interlocutory so far as they are concerned, and remains subject to revision and alteration.¹⁵

All three parties may appeal.—Upon a bill of interpleader the complainant or either of the claimants may appeal, if their individual rights are affected by the decree, and the fact that neither of the claimants, called on by the bill to litigate their rights, appeals, does not impair or destroy the complainant's right of appeal.¹⁶

When applicant cannot appeal.—When a person seeking relief has obtained an interpleader order, and has paid the money into court, he cannot further interfere so as to object to any ruling or decision affecting the rights of the claimants alone.¹⁷ When an interpleader order is appealed from, the applicant has no right to appear to protect his costs, unless his conduct is the subject of the appeal, or unless the mode of relief by interpleader is in dispute.¹⁸

¹⁰ *Hovey v. Whiting* (1888), 14 Canada S. C. R. 515.

¹¹ *Hunter v. Hunter* (1898), 18 Can. L. T. 114.

¹² *Bain v. Lyle* (1871), 68 Pa. St. 60.

¹³ Pa. P. L. No. 80 of 1897.

¹⁴ *Atkinson v. Manks* (1823), 1 Cow. N. Y. 691.

¹⁵ *Barth v. Rosenfeld* (1872), 36 Md. 604; *Heald v. Rhind* (1897), 86 Md. 320.

¹⁶ *Cooper v. Jones* (1857), 24 Georgia, 474.

¹⁷ *St. Louis v. Alliance* (1876), 23 Minn. 7; *First National v. West River* (1874), 46 Vt. 633.

¹⁸ *Ex p. Webster, In re Morris* (1882), 22 Chy. Div. 136; *Kilpatrick v. Gilliam* (1890), 16 Vict. L. R. 673; *Trickett v. Girdlestone* (1897), 103 Law Times Jr., 81.

When claimant cannot appeal.—When a bill of interpleader is dismissed upon the demurrer of one only of the defendants, the other defendant cannot appeal from such decision, he is not prejudiced, for it is still open to him to sue the person holding the subject matter in dispute.¹⁹

Where the sum in question had been paid into court by a stakeholder under an interpleader order, it was held that the court could not go behind that order, or enter into the question whether it was rightly made or not. The money was in court and the question was, what was to become of it?²⁰

Execution debtor cannot appeal.—An execution debtor, who generally is not a party to a sheriff's interpleader, cannot move in the cause in which judgment has been recovered against him, to set aside the order obtained by the sheriff, or the issue and judgment given thereon.²¹

English statute limiting appeals.—The second section of the English Interpleader Act of 1831 provided, that the judgment in any such action or issue as might be directed by the court or judge in any interpleader proceedings, and the decision of the court or judge in a summary manner, should be final and conclusive against the parties and all persons claiming by, from or under them.²² In 1860 this provision was re-enacted in section 17 of the Common Law Procedure Act of that year,²³ and in 1883, although section 17 was still in force, a new rule was framed, which enacts that, "*except where otherwise provided by statute the judgment in any action or on any issue ordered to be tried or stated in an interpleader proceeding, and the decision of the court or a judge in a summary way, shall be final and conclusive against the claimants and all persons claiming under them, unless by special leave of the court or judge, as the case may*

¹⁹ *Washington v. Belt* (1898), 13 App. D. C. 202.

²⁰ *Schoolbred v. Roberts* (1900), 2 Q. B. 497.

²¹ *McNider v. Baker* (1864), 10 U. C. L. J. O. S. 193.

²² 1 & 2 Will. IV., c. 58, s. 2.

²³ 23 & 24 Vict. c. 126, s. 17; *Dodds v. Shepherd* (1876), 1 Ex D. 75.

be, or of the Court of Appeal."²⁴ It has been held, that the words at the beginning of the rule '*except where otherwise provided by statute*' were inserted to leave section 17 untouched,²⁵ and that consequently section 17 governs, and in the cases covered by it there is no power to give leave to appeal;²⁶ and hence, the words in the end of the rule, '*unless by special leave*' are practically nugatory.

From summary decisions.—In England therefore, when the court or a judge in chambers disposes of the matter summarily upon the merits, the order is final and conclusive,²⁷ and there is no power to give leave to appeal,²⁸ even with consent of parties.²⁹ Every decision of a judge in an interpleader matter, when he does not direct an issue or a special case, is a summary decision, and no appeal will lie from what he has thus decided.³⁰

It is equally a summary decision whether the order has been drawn up or not;³¹ and a determination to hear the matter summarily, and an adjournment that evidence may be produced, is the same as a summary decision so far as the right of appeal goes;³² and when the judge at chambers refers the matter to a Divisional Court, which bars the claimant summarily without directing an issue, no appeal lies.³³

Although there is no appeal, it has been said that a judge has a right, when an order has not been drawn up, to stay the matter and re-hear it, if his attention is drawn to some-

²⁴ Order VLII., r. 11.

²⁵ *Field v. Rivington* (1889), 5 Times R. 642.

²⁶ *Dodds v. Shepherd* (1876), 1 Ex. D. 75; *Lyon v. Morris* (1887), 19 Q. B. D. 189.

²⁷ *Shortridge v. Young* (1843), 12 M. & W. 5; *Waterhouse v. Gilbert* (1885), 15 Q. B. D. 509; *Bryant v. Reading* (1886), 17 Q. B. D. 128; see also *Mercantile Finance, etc., Coy., v. Hall* (1893), 19 Victorian L. R. 233.

²⁸ *Lyon v. Morris* (1887), 19 Q. B. D. 189; *contra Robinson v. Tucker* (1884), 14 Q. B. D. 371; *Dawson v. Fox* (1885), 14 Q. B. D. 377; *Webb v. Shaw* (1886), 16 Q. B. D. 658.

²⁹ *Dodds v. Shepherd* (1876), 1 Ex. D. 75.

³⁰ *Re Tarn* (1893), 2 Chy. 280.

³¹ *Re Roberts* (1887), W. N. 231.

³² *Bryant v. Reading* (1886), 17 Q. B. D. 128.

³³ *Turner v. Bridgett* (1862), 9 Q. B. D. 55.

thing which should be further considered;³⁴ or, if a judgment has been improperly given, in the absence of one of the parties, a rehearing ought to be allowed.³⁵

A summary order made by a Master is subject to appeal, because his decision is not that of the court or a judge, and so is not within the English section 17 above referred to, but is governed by the general rule which allows an appeal from a Master to a Judge in Chambers.³⁶ But a Master's decision which goes to a Divisional Court on appeal, is not further appealable to the Court of Appeal.³⁷

A summary order in interpleader made by a judge in bankruptcy can be appealed from.³⁸

The applicant can always appeal from a summary decision. Section 17, above referred to, making a summary decision final and conclusive against the parties, does not make it final against the sheriff, and he can appeal; "parties" means parties claiming, and the sheriff is not such a party.³⁹

Final order in chambers.—In England it has been further held, in construing section 17 of the Act of 1860, that the judgment in any action or issue which is final and conclusive is the final judgment which is pronounced in chambers, after the action or issue directed upon the interpleader has been tried,⁴⁰ and from which there is no power to give leave to appeal.⁴¹

In Ontario a provision corresponding to the English section 17 of 1860, was in force from 1843 to 1888, when it was repealed.⁴² It was construed in the same way as the

³⁴ *Re Roberts* (1887), W. N. 231.

³⁵ *Ex parte Streeter, In re Morris* (1881), 19 Chy. D. 216.

³⁶ *Bryant v. Reading* (1886), 17 Q. B. D. 128; *Clench v. Dooley* (1887), 56 L. T. 122; *contra Westerman v. Rees* (1888), W. N. 228.

³⁷ *Waterhouse v. Gilbert* (1885), 15 Q. B. D. 509; *Bryant v. Reading* (1886), 17 Q. B. D. 128.

³⁸ *Ex parte Streeter, In re Morris* (1881), 19 Chy. D. 216.

³⁹ *Smith v. Darlow* (1884), 26 Chy. D. 605.

⁴⁰ *Robinson v. Tucker* (1884), 14 Q. B. D. 371; *Field v. Rivington* (1889), 5 Times R. 642; *Hartmont v. Foster* (1881), 8 Q. B. D. 82; *contra Teggin v. Langford* (1842), 10 M. & W. 550.

⁴¹ *Lyon v. Morris* (1887), 19 Q. B. D. 139.

⁴² 7 Vict. Canada c. 30, s. 2; R. S. O. 1877, c. 54, s. 7.

English section.⁴⁵ Under the Ontario Rules adopted in 1888 it was provided that a summary decision should be subject to appeal.⁴⁶

In most of the Australian colonies, and the other Canadian Provinces provisions founded on section 17 are in force.⁴⁸

Where, on a sheriff's application, the judge decides in a summary manner in favour of the claimant, and orders the sheriff to withdraw, and protects him from action by the claimant, the execution creditor can appeal from such an order, as well as the sheriff.⁴⁹

Judgment on trial of issue.—Under the English practice there has always been an appeal from anything which takes place at the trial of an interpleader issue, whether the issue has been tried by a judge alone, or by a judge with a jury, notwithstanding section 17 of the Act of 1860, because the judgment or direction at the trial is not the disposition of the whole matter and is not final.⁴⁷ When the issue has been tried by a judge and jury, the appeal is to a Divisional Court, if by a judge alone to the Court of Appeal.⁴⁸

It does not make any difference in this respect, that having tried the issue, the trial judge immediately goes on and makes a final order disposing of the whole matter of the interpleader proceedings, an appeal still lies from what took place at the trial.⁴⁹

⁴⁵ *Wilson v. Kerr* (1800), 18 Upper Canada Q. B. 470; *Leeson v. Lemon* (1881), 9 Ont. Pr. 103; *Cole v. Campbell* (1883), 9 Ont. Pr. 498.

⁴⁶ Ont. Rules 1110.

⁴⁷ See Appendix.

⁴⁸ *Rondot v. Monetary Times* (1890), 19 Ont. Pr. 23.

⁴⁹ *Withers v. Parker* (1859), 4 H. & N. 810; *Wilson v. Kerr* (1800), 18 Upper Canada Q. B. 470; *Gumm v. Tyrie* (1805), 6 B. & S. 298; *Witt v. Parker* (1877), 46 L. J. Q. B. 450; *Turner v. Bridgett* (1882), 9 Q. B. D. 55; *Robinson v. Tucker* (1884), 14 Q. B. D. 371; *Dawson v. Fox* (1885), 14 Q. B. D. 377; *Ramsay v. Margrett* (1894), 2 Q. B. p. 22. *Contra* *King v. Simmons* (1848), 7 Q. B. p. 311; *Burstall v. Bryant* (1883), 12 Q. B. D. 108; *Parnell v. Stedman* (1883), 12 Q. B. D. 104 note.

⁵⁰ *Robinson v. Tucker* (1884), 14 Q. B. D. 371; but see *Burstall v. Bryant* (1883), 12 Q. B. D. 108; *Parnell v. Stedman* (1883), 12 Q. B. D. 104 note.

⁵¹ *Robinson v. Tucker* (1884), 14 Q. B. D. 371.

The usual practice is for the judge at chambers to delay making a final order, when it appears that an appeal is to be taken from the judgment at the trial.

Upon an appeal, the court instead of granting a new trial, may, if satisfied that all requisite materials for arriving at a conclusion are before it, pronounce the judgment which in its opinion should have been pronounced on the trial of the issue.⁵⁰

In Ohio, when the question at issue between the claimants is for money only, the judgment is not appealable.⁵¹

Special cases.—An appeal will lie from the judgment on a special case, stated in interpleader proceedings.⁵²

Orders without jurisdiction.—Where there is no jurisdiction in the first instance to make the interpleader order directing the trial of an issue, or when an issue is sent for trial to a tribunal which has no jurisdiction to hear the matter, the trial of the issue must be looked upon as in the nature of an arbitration or summary trial by consent, and therefore final and not subject to appeal.⁵³ Where all parties agreed to refer the cause, on certain terms, to a barrister, instead of having an issue directed, the court refused to stay the order.⁵⁴

From orders as to costs.—The English statute which provides that no order as to costs only shall be subject to appeal, except by leave of the court, has been held to apply to judge's orders in interpleader, as well as in other proceedings.⁵⁵ But an appeal lies from an interpleader order as

⁵⁰ *Williams v. Mercier* (1882), 9 Q. B. D. 337; *Lehman v. Hildebrand*, 10 Lanc. Pa. 249.

⁵¹ *Warner v. Jaeger* (1890), 5 Ohio Circuit Cts. 16; *Pratt v. Aetna Life Ins. Coy.* (1890), 5 Ohio Circuit Cts. 537.

⁵² *Gumm v. Tyrie* (1865), 6 B. & S. 298.

⁵³ *Carew v. Hanly.* (1890); 24 Ir. L. T. R. 33; *Richardson v. Shaw* (1876), 6 Ont. Pr. 296; *Federal Bank v. Canadian Bank of Commerce* (1896), 13 Canada S. C. R. p. 399; *Coyne v. Lee* (1887), 14 Ont. App. 503; *Teskey v. Neil* (1893), 15 Ont. Pr. 244; *Clancy v. Young* (1893), 15 Ont. Pr. 248.

⁵⁴ *Drake v. Brown* (1835), 1 O. M. & R. 270.

⁵⁵ *Hartmont v. Foster* (1881), 8 Q. B. D. 82; *Field v. Rivington* (1880), 5 T. L. R. 642; *contra Tegg v. Langford* (1842), 10 M. & W. 556.

to costs, when the order has been made without jurisdiction.⁵⁵

When merits not tried.—When a claimant applies for a new trial, after a verdict obtained without the merits having been gone into, one of the objects of ordering the trial of an interpleader issue has been defeated, and there is not the same necessity upon the motion for an affidavit disclosing the merits, as in moving for a new trial in an ordinary action, because the very issue itself discloses what the claimant's claim is.⁵⁷

When fund paid over.—It has been held in Manitoba, that a claimant's right to appeal is not affected by the fact that the applicant has under the order appealed against, delivered the goods to the other claimant,⁵⁸ while the Court of Appeal in Ontario has decided, that after money, which has been in question, has been paid over, no appeal lies.⁵⁹

New matter cannot be used.—If a claimant omit to set up some ground which he might have done at the trial of the issue, he will not be allowed to set it up afterwards on an appeal, by reason of the maxim, *interest reipublice et ut finis litium*.⁶⁰ A claim based on another title, not disclosed at the trial, will not be allowed, and it does not matter that it was the claimant who was successful on the issue who now attempts to set it up, such should be a matter of substantive application.⁶¹

Affidavits and admissions, upon which the court acted in granting an interpleader order, cannot be used by a claimant upon an appeal from the judgment at the trial of the issue.⁶²

⁵⁵ Hansen v. Maddox (1883), 12 Q. B. D. 100.

⁵⁶ Vidal v. Bank of Upper Canada (1865), 24 Upper Canada Q. B. 430; 15 Upper Canada C. P. 421.

⁵⁷ Howe v. Martin (1890), 6 Man. 477.

⁵⁸ Wilson v. Wilson (1878), 3 Ont. App. 400; see also Schoolbred v. Roberts (1900), 2 Q. B. 497.

⁵⁹ Re Hilton (1892), 67 L. T. 594; Thompson v. De Lissa (1881), 2 N. S. W. L. R. 165.

⁶⁰ Barker v. Leeson (1881), 1 Ont. 114.

⁶¹ White v. Rech (1895), 171 Pa. St. 82.

Error corrected without appeal.—There is not the same necessity for allowing an appeal from the judgment or verdict upon the trial of an interpleader issue, as there is in ordinary cases, because many questions raised on an appeal may be adjudicated upon when the matter goes back to chambers. The court may be so satisfied with what has transpired at the trial, although the verdict of the jury may be open to exception, as to have a sufficient view of the rights of the parties to enable it to act. Thus a new trial was refused when the court was satisfied, although the judge who tried the case had directed the wrong party to begin.⁶³

Where an execution creditor appealed from the verdict in favour of the claimant a married woman, on the ground that she had no title in law, as the title was in the husband the debtor, the court refused to set aside the verdict, as the question raised might go to the judge at chambers for disposition. It was pointed out, that the refusal of the appeal had not the effect of deciding that the goods were not subject to the execution, or that they were, that question being still open to the judge at chambers.⁶⁴

Cases where appeals refused.—In the following instances the court has refused to set aside a verdict:—Where the judge inadvertently stated the issue to the jury in a wrong form;⁶⁵ where there was a variance between the issue directed by the interpleader order, and the issue stated in the record, the latter being the issue which ought to have been directed;⁶⁶ and where the claimant claimed all the goods seized as his own property, although as a fact he was a partner with the debtor and had only a two-thirds interest, the verdict having gone against him, the court refused to allow him to have the matter re-opened, although he had made a mistake in stating his claim, and awarded the whole fund to the execution creditor.⁶⁷

⁶³ *Edwards v. Matthews* (1847), 16 L. J. Ex. 291; 4 D. & L. 721.

⁶⁴ *Bird v. Crabb* (1861), 30 L. J. Ex. 318; 7 H. & N. 996.

⁶⁵ *Evans v. Evans* (1893), 155 Pa. St. 572.

⁶⁶ *Gourlay v. Ingram* (1860), 2 Chy. Chamb. 309 (Ont.).

⁶⁷ *Larkin v. Graham* (1883), 2 N. S. W. L. R. 65.

If first order irregular.—It has been said with regard to interpleader cases, that the court is bound not only to consider the interests of the parties in the suit, but, as far as possible, to keep the practice of the courts intact. By neglecting to do this, risk is run of having all the subsequent proceedings set aside, by reason of the irregularity of the order on which they are founded.⁶⁶

Prohibition.—Where an applicant for relief is affected by an order in an inferior court, in interpleader proceedings, from which no appeal lies, he should apply for prohibition in the Superior Court to prevent the order from being acted upon.⁶⁷ But if the order, though erroneous, is made at the request of one of the parties and is acted upon, a prohibition at the request of such party will be refused.⁷⁰

Certiorari.—When an interpleader order has been made in an inferior court, directing an issue in that court, it has been held that a certiorari does not lie to remove the interpleader issue from the inferior to a superior court, and if such a writ do improvidently issue, an application should be made to quash the certiorari and not for a *procedendo*.⁷¹

When order entitled in two divisions.—When an interpleader order is entitled in two actions in different divisions of the court, there being two executions in the sheriff's hands, an appeal from the order may be entertained in either division, although one of the execution creditors may have been barred.⁷²

From Inferior Courts.—When interpleader proceedings have been transferred for trial to an inferior court, as a rule an appeal lies to the superior court from any order or judg-

⁶⁶ *Masterman v. Lewin* (1847), 2 Phillips p. 188; *Roselle v. Bank* (1893), 119 Mo. 84.

⁶⁷ *Temple v. Temple* (1894), 10 R. 269; *Re Gould & Hope* (1893), 20 Ont. App. 347.

⁶⁸ *Richardson v. Shaw* (1876), 6 Ont. Pr. 296.

⁶⁹ *Jones v. Harris* (1890), 6 Upper Canada L. J. O. S. 16; *Russell v. Williams* (1862), 8 U. C. L. J. O. S. 277; *Ex p. Summers* (1854), 18 Jur. 522.

⁷⁰ *Hogaboom v. Grundy* (1894), 16 Ont. Pr. 47.

ment in the former;⁷³ and when interpleader proceedings originate in an inferior court, there is generally an appeal to a superior court.⁷⁴

Cases in Inferior Courts.—The following are decisions affecting interpleader appeals in inferior courts:—

Where a landlord appears upon the hearing of an interpleader summons, he, as well as the execution creditor and the claimant, has a right of appeal.⁷⁵

Where a statute allows an appeal, with the leave of the court, when the money claimed, or the value of the goods and chattels claimed exceeds £20, an appeal lies, although the debt for which the goods were seized is less than £20.⁷⁶ If neither the money claimed, nor the value of the goods, exceed £20, the court has no power to grant leave to appeal.⁷⁷ Where a claimant paid £12 into court as the appraised value of goods, and afterwards sought to appeal, alleging that the goods were greater in value than £20, the appeal was refused on the ground that it could only relate to the sum in court.⁷⁸ And where the goods were less than £20 in value, but the claimant sought £35 damages against the bailiff and execution creditor, but was allowed £15 only as against the creditor, an appeal was refused, as it was held that a claim for damages is not within the statute.⁷⁹

Where judgment was given for the execution creditor with costs, and the claimant succeeded on appeal in getting a new trial directed, it was held that the whole judgment, including that part which related to costs, was thereby reversed.⁸⁰

⁷³ *Hughes v. Little* (1880), 18 Q. B. D. 32; *Thomas v. Kelly* (1888), 13 App. Cas. 506; *Barker v. Leeson* (1881), 9 Ont. Pr. 107; *Clancy v. Young* (1898), 15 Ont. Pr. p. 252, 253.

⁷⁴ *Feehan v. Bank of Toronto* (1860), 10 Upper Canada C. P. 32. See also Ont. Rev. Statutes (1897), c. 55, s. 52; but see *Isbister v. Sullivan* (1888), 9 Canada L. T. 3, as to Ontario District Courts.

⁷⁵ *Wilcoxon v. Searby* (1860), 29 L. J. Ex. 154.

⁷⁶ *Vallance v. Naish* (1858), 3 H. & N. 712; 27 L. J. Ex. 142.

⁷⁷ *Collis v. Lewis* (1887), 20 Q. B. D. 202.

⁷⁸ *White v. Milne* (1887), W. N. 256.

⁷⁹ *Lumb v. Teal* (1869), 22 Q. B. D. 675.

⁸⁰ *Gage v. Collins* (1867), L. R. 2 U. P. 381.

Where one section of the statute made the order in interpleader proceedings final and conclusive, unless there should be an appeal under the same Act, it was held, that a subsequent section which allowed an appeal by way of an order to review, might be invoked.⁶¹

It has been held in Ireland that no appeal lies from the decision of a County Court judge upon an interpleader process, under a provision which allows an appeal to any person dissatisfied with an order of dismissal on the merits.⁶²

⁶¹ *Andrew v. Barker* (1891), 17 Victoria, 514 (Australia).

⁶² *Lacy v. Dwyer* (1881), 15 Ir. L. T. R. 58.

CHAPTER XV.

ACTION IN THE NATURE OF A BILL OF INTERPLEADER.

Reasons for the proceeding.—While the remedy by means of interpleader is a valuable and necessary process in legal procedure, still its scope is limited, and many cases of conflicting claims are not covered. A person owing a debt or in possession of property may not be able to show all the strict conditions necessary before the court will award relief by way of interpleader, and may still be an innocent stakeholder desirous of doing what is fair and right between himself and two adverse claimants. These are the cases where an action, or a bill, in the nature of a bill of interpleader will lie by a party who has some interest, to ascertain and establish his own rights when there are conflicting rights between third persons.¹

When resorted to.—An action in the nature of a bill of interpleader, as a distinct proceeding, has now become well known, more especially in the United States. It is resorted to by a person upon whom adverse claims are made in respect of a fund or property, in connection with which such person has himself some interest, and as to which he cannot consequently ask the ordinary relief by interpleader. The action should not be brought, except when there is no other way for the plaintiff to protect himself.²

The object.—In such an action the plaintiff seeks to ascertain his own rights to property in his hands, as well

¹ *Commercial National Bank of Peoria v. Newman* (1894), 55 Ill. App. 534; *Van Winkle v. Owen* (1896), 54 N. J. Eq. 253.

² *Hinckley v. Pfister* (1892), 83 Wis. 64.

as the rights of third persons claiming it, and that any actions commenced against him may be stayed; while in an ordinary interpleader he only asks that he be at liberty to pay money or deliver property to the party to whom it belongs, and that thereafter he may be protected against the claims of both.³

May assert an interest.—In this proceeding the plaintiff may have a personal interest in the subject matter,⁴ and so may deny that he owes the defendants what they severally claim.⁵ He may also ask for some active affirmative relief as against the claimants,⁶ in addition to a discharge from liability to them,⁷ as when he desires to establish his own rights where there are other conflicting rights between the third parties.⁸ It has been said that the proceeding can only be sustained when the parties sought to be interpleaded have some right or interest in the subject matter of the action, which interferes with the plaintiff's attempt to establish his own rights.⁹

Need not deny collusion.—It is not necessary for the plaintiff to allege in his bill, or to assert by affidavit, that he is indifferent between the contesting parties and does not collude with either of them;¹⁰ nor is it necessary that he be an entirely disinterested party.¹¹ It has been held however that he must not act in a partisan manner.¹²

Need not pay into court.—The person who seeks to settle

³ *Blythe v. Whiffin* (1872), 27 L. T. 330; *Heath v. Hurless* (1874), 73 Ill. 323.

⁴ *Hodges v. Griggs* (1840), 21 Vt. 290; *Groves v. Sentell* (1804), 153 U. S. p. 486.

⁵ *Supervisors of Saratoga v. Deyoe* (1879), 77 N. Y. 219.

⁶ *Orr v. Larcombe* (1879), 14 Nev. 53; *Illingworth v. Rowe* (1894), 52 N. J. Eq. pp. 360 and 456.

⁷ *Blue v. Watson* (1882), 50 Miss. 619.

⁸ *Ebbinghaus v. Killian* (1881), 1 Mackey D. C. 247; *Bridesburg Mfg. Coy.'s Appeal* (1884), 106 Pa. St. 275.

⁹ *McHenry v. Hazard* (1860), 45 Barb. N. Y. 657; but see *Cross v. Memphis* (1892), 11 So. Rep. Ala. 490.

¹⁰ *Koppinger v. O'Donnell* (1889), 16 R. I. 417; *Van Winkle v. Owen* (1890), 54 N. J. Eq. 253.

¹¹ *Whefield v. Bacon* (1857), 24 Barb. N. Y. 154; *Gaynor v. Blewett* (1893), 55 N. W. Rep. 169 Wis.

¹² *Hinckley v. Pfister* (1892), 83 Wis. 64.

his difficulties by this mode of procedure is not obliged to bring the money or fund into court.¹³

Nature of claims.—Injunction.—The plaintiff must show that the defendants have interposed substantial claims,¹⁴ and if he makes out a case showing that it is proper for the court to interfere in his favour, he will be awarded an injunction staying any suits which may have been commenced against him.¹⁵

Mortgagor.—A mortgagor entitled to redeem a mortgaged estate, and in doubt to which of two the mortgage debt should be paid, both claiming title to the mortgage moneys, may institute proceedings in the nature of an interpleader for his own relief and protection so that he may obtain a decree adjudging which of the hostile claimants is entitled to the debt, and that on its payment the mortgage may be surrendered to him for cancellation.¹⁶ When a mortgagor is compelled to resort to such proceedings, he may be allowed his costs contrary to the usual practice in suits to redeem, but such costs are not allowed him as a matter of right, but in the discretion of the court.¹⁷

Person entitled to equitable relief.—If a party is entitled to equitable relief against the owner of property, of which the legal title is in dispute, so that he cannot ascertain to whom it belongs, he may file a bill against the several claimants in the nature of a bill of interpleader.¹⁸

Purchaser.—A purchaser of personal property may file a bill in the nature of a bill of interpleader against his vendor and a third person who claims a right to the same, or

¹³ *Gaynor v. Blewett* (1893), 55 N. W. Rep. 169 Wis. *Ent. &c*
Fowler v. Williams (1859), 20 Ark. 641.

¹⁴ *Dreyfus v. Casey* (1889), 52 Hun. N. Y. 95.

¹⁵ *McHenry v. Hazard* (1871), 45 N. Y. 580; *Blythe v. Whiffin* (1872), 27 L. T. 330; *Curtis v. Williams* (1889), 35 Ill. App. 518.

¹⁶ *Goodrick v. Sholtbolt* (1712), Prec. ch. 333, 336; *Sholtbolt v. Biscow* (1761), 2 Eq. Ab. 173; *Koppinger v. O'Donnell* (1889), 18 R. I. 417; *Curtis v. Williams* (1889), 35 Ill. App. 518; *Illingworth v. Rowe* (1894), 52 N. J. Eq. 456.

¹⁷ *Bedell v. Hoffman* (1830), 2 Pal. N. Y. 109.

¹⁸ *Mohawk v. Clute* (1834), 4 Pal. N. Y. 384; *Dohnert's Appeal* (1870), 64 Pa. St. 311.

who seeks to avoid the vendor's title;¹⁹ and so may a purchaser of land, in doubt as to the proper party to receive the balance of his purchase money.²⁰

Owner of new buildings.—The owner of newly erected buildings may also maintain such a proceeding, when a balance payable under the building contract is claimed by several, as by the contractor, sub-contractor, lien holders or attaching creditors.²¹ In some instances this has been considered a case for interpleader proper.²²

Trustee or executor.—A trustee may bring a bill in the nature of a bill of interpleader, and obtain instructions from the court as to his duty, when different parties are making adverse claims in relation to the trust, and he is in doubt as to their rights,²³ and so may an executor.²⁴ This corresponds in some measure with the Scots proceeding of multiplepoinding, in which a trustee may have relief under similar circumstances.²⁵

Receiver.—A receiver, not being entirely disinterested, and having to account to the court, may bring like proceedings when a fund in his hands is claimed by two parties.²⁶

Judgment debtor.—Where a defendant against whom a decree is recorded in favour of an administrator, for money due the intestate, is notified by the heirs that the plaintiff has ceased to be administrator and has no right to collect the money, he may if he has good ground to believe that it will be unsafe to pay it over, file a bill in the nature of a bill of interpleader, bringing the money into court.²⁷

Tax payer.—When land lies partially in two adjoining municipalities, and is assessed and taxed in both, and both

¹⁹ *Dardens v. Burns* (1844), 6 Ala. 362.

²⁰ *Parks v. Jackson* (1833), 11 Wend. N. Y. 442, 450.

²¹ *Newhall v. Kastens* (1873), 70 Ill. 156; *Board of Education v. Scoville* (1874), 13 Kan. 17; *Hall v. Baldwin* (1889), 45 N. J. Eq. 858; *Illingworth v. Rowe* (1894), 52 N. J. Eq. 380.

²² See *ante* page 38.

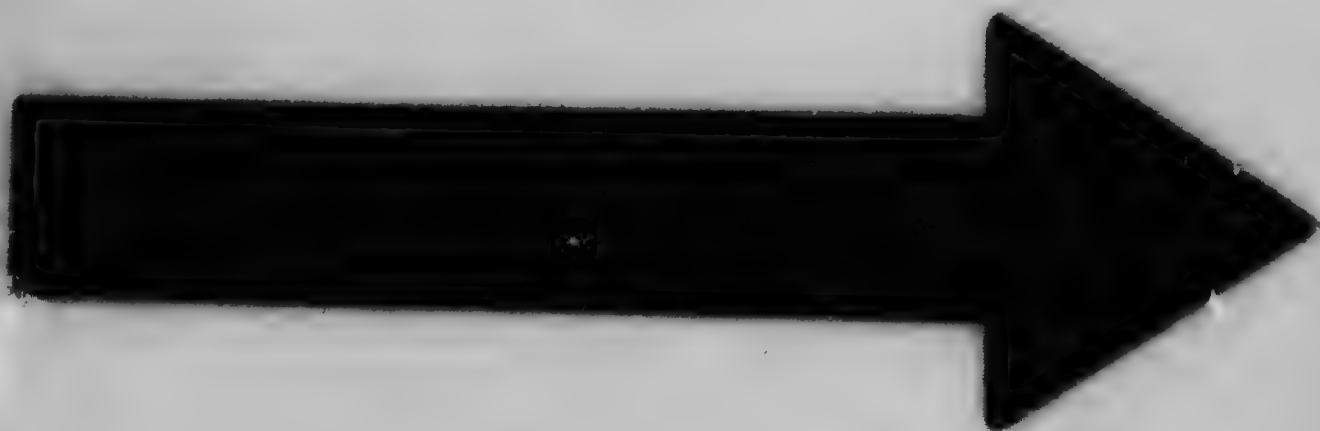
²³ *Sprague v. West* (1879), 127 Mass. 471.

²⁴ *Crosby v. Mason* (1865), 32 Conn. 482; *Osborne v. Taylor* (1885), 12 Grat. Va. 117.

²⁵ See page 31.

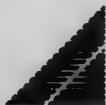
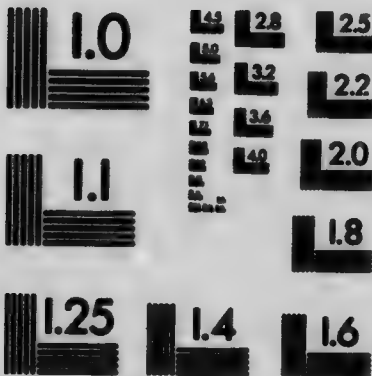
²⁶ *Winfield v. Bacon* (1857), 24 Barb. N. Y. 154.

²⁷ *Fowler v. Williams* (1859), 20 Ark. 641.



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collectors demand the taxes, the occupant or owner may maintain like proceedings to determine in which place the land is properly taxed.²⁸ In some instances however this has been considered a case proper for ordinary interpleader.²⁹

In Massachusetts the proceeding will be entertained, provided it is not demurred to upon the ground of public policy. It has been said that the prompt and unembarrassed collection of taxes is a matter of public policy. When relief is refused, the proper course is for the taxpayer to pay, and then to sue to recover it back.³⁰

Person liable on a contract.—Where a person alleged that a written obligation had been obtained from him by fraud, and it appeared that two persons each claimed the instrument by independent assignments and had begun suits upon it, it was held that the fraud being proved such person might be relieved from the obligation in a suit against both claimants.³¹

Municipal corporation.—A municipal corporation may maintain a suit in the nature of an interpleader, when through a conflict of authority and a double appointment, two persons claim the same salary for the same municipal office;³² also where it appears that a municipal treasurer has issued bonds or notes in excess of his authority, all of which have passed into the hands of *bona fide* holders for value, and the various holders have threatened or commenced actions, the corporation being willing to pay the amount authorized;³³ as well as where rival parties claim the damages which have been allowed for land expropriated for public purposes by the corporation.³⁴

²⁸ *Redfield v. Supervisors* (1839), 1 Clark Eq. N. Y. 42; *Dorn v. Fox* (1874), 61 N. Y. 264.

²⁹ See page 33.

³⁰ *Hardy v. Yarmouth* (1863), 88 Mass. 277; *Macey v. Nantucket* (1876), 121 Mass. 351; *Forest River Lead Coy. v. Salem* (1896), 165 Mass. 193.

³¹ *McHenry v. Hazard* (1866), 45 N. Y. 580.

³² *New York v. Flagg* (1858), 6 Abb. Pr. N. Y. 296; *Buffalo v. Mackay* (1878), 15 Hun. N. Y. 204.

³³ *Supervisors of Saratoga v. Deyoe* (1879), 77 N. Y. 219; *Saratoga v. Seabury* (1881), 11 Abb. N. C. N. Y. 461.

³⁴ *Hilton v. St. Louis* (1889), 90 Mo. 199.

A creditor cannot have relief.—Where a claimant upon his own motion, and against the wish of the plaintiff, was allowed into a pending action and sought to have the matter turned into an interpleader proceeding, it was held that he could not do so, because it is the debtor alone and not the creditor who is the party to institute interpleader. It was also held that he could not maintain his proceeding as being in the nature of a bill of interpleader.³⁵

In Connecticut.—In Connecticut the practice seems to be to extend the remedy by bills of interpleader, and to do away with the distinction between them, and bills in the nature of bills of interpleader.³⁶

In New York.—In New York, in 1894, the interpleader code was amended, so as to enable a defendant to bring into an action an adverse claimant, even when the defendant disputes, in whole or in part, the liability asserted against him; or where he has some interest in the subject matter which he desires to assert. The defendant still remains a party, and the whole controversy is determined in the action.³⁷

In Pennsylvania.—In Pennsylvania actions in the nature of bills of interpleader are not in use.³⁸

In Louisiana.—On general principles it has been held in Louisiana that the Code of Practice which does not cover interpleader, does not exclude all other remedies than those provided for, and accordingly the courts will enforce remedies through a proceeding in the nature of a bill of interpleader in chancery.³⁹

³⁵ *Kortjohn v. Seimers* (1888), 27 Mo. App. 271; see also *Arn v. Arn* (1899), 2 Mo. A. Rep. 734.

³⁶ *Consociated v. Staples* (1855), 23 Conn. 544; *Union Trust v. Stamford* (1899), 43 Atl. 555 (Conn.).

³⁷ *New York Statutes of 1894*, c. 246. See appendix.

³⁸ *Bridesburg Mfg. Coy.'s Appeal* (1884), 106 Pa. St. 275; but see *Dohnert's Appeal* (1870) 64 Pa. St. 311.

³⁹ *Morris v. Cain* (1888) Lou. Ann. 759.

APPENDIX

INTERPLEADER STATUTES.

Alabama.—In this State the equitable principles of interpleader were adopted and are followed by the Courts: *Hayes v. Johnston* (1842), 4 Ala. 267; *Gibson v. Goldikwaite* (1845), 7 Ala. 281. As to testimony on bills of interpleader, see Chancery Rule 56. The complainant in a bill of interpleader, intending to take testimony, must give notice and serve interrogatories upon the parties required to interplead; and if either of the defendants desires to take testimony, he must serve interrogatories, as well upon the complainant, as upon the adverse defendant; but after a decree of interpleader, it shall not be necessary for either defendant taking testimony to serve the complainant with interrogatories or notice. The following Code provisions have been adopted, sections 2,633, 2,634 and 2,635 of the Code of 1897.

A defendant against whom an action is pending upon any contract for the payment of money may, at any time before issue joined, make affidavit that a person not a party to the suit, without collusion with him, claims the money in controversy, and deposit the money in Court, praying an order that such person be required, on notice to come in and defend; and thereupon if such person do not voluntarily come in and make himself a party defendant, the Court must, if he resides within the State, order a summons to issue to him to appear at the next term and make himself a party defendant, of which service must be made for at least ten days before the return day; or if he reside without the State, order notice to him by publication for three successive weeks in some newspaper published in the county; or, if there be no such paper, in a newspaper published nearest to the county; and after such notice has been given, the Court may make an order that such person be substituted as a party to the suit, in place of the defendant, and thereupon such person stands in the place of the defendant, and the latter is discharged from liability to the plaintiff and substituted defendant for the money sought to be recovered of him.

The defendant in an action for the recovery of chattels in specie, not claiming title, may at any time before issue joined, make affidavit that a person not a party to the suit; without collusion with him, claims the chattels or a part thereof, and pray an order that such person be required on notice to come in and defend; and thereupon, if such person do not voluntarily come in and make himself a party defendant the Court must,

If he resides within the State, order a summons to issue to him to appear at the next term and make himself a party defendant, of which service must be made for at least ten days before the return day, or if he resides without the state, order notice to him, by publication for three successive weeks in some newspaper published in the county; or, if there be no such paper, in a newspaper published nearest to the county. If such person appears and makes himself a party defendant, the defendant may be discharged; and if the defendant has retained possession of the chattels giving bond, the Court may order the chattels to be delivered to such person, on his giving bond with sufficient surety, to be approved by the clerk, payable to the plaintiff, in the penalty of the bond of the defendant; with condition that if he is cast in the suit he will within twenty days thereafter, deliver the chattels and pay all such damages as may be assessed for the detention thereof, and all costs adjudged against him. If such person refuse or neglect for three days after being made a party defendant to give such bond, the chattels must be delivered to the plaintiff on his giving bond with sufficient surety, to be approved by the clerk, payable to such person in the penalty of the bond of the defendant, and with like condition; on the execution and approval of either bond, the bond of the defendant is discharged and must be cancelled. The bonds taken under this section, on breach of the condition thereof, and on the return of the sheriff, as in the case of bonds taken from plaintiff or defendant in other actions for the recovery of chattels in specie, have the force and effect of judgments, on which execution may issue against all or any of the obligors. If such person on notice, does not come in and defend, the judgment rendered in the action bars him from maintaining any action against plaintiff or defendant for the chattels, or the taking, or conversion, or detention thereof. If the plaintiff fail to give bond as provided in this section the chattels must be delivered to the defendant."

When the defendant is a corporation the affidavit under either of the two preceding sections may be made by such officer, agent or servant of the corporation, as may have knowledge of the facts set forth in the affidavit.

Alaska.—Code of Civil Procedure, section 37.—In any action for the recovery of specific personal property, if a third person demand of the defendant the same property, the Court in its discretion on motion of the defendant, and notice to such person and the adverse party, may before answer, make an order discharging the defendant from liability to either party, and substitute such person in his place as defendant. Such order shall not be made but on condition that the defendant deliver the property or its value to such person as the Court may direct, nor unless it appears from the affidavit of the defendant, filed with the clerk by the day he is otherwise required to answer, that such person makes such demand without collusion with the defendant. The affidavit of such third person as to whether he makes such demand of the defendant may be read on the hearing of the motion.

Arizona has no interpleader statute. The following is the nearest approach to one. Revised Statutes, 1887, section 880.

When it is admitted by the pleading or examination of a party that he has in his possession or under his control any money or other thing capable of delivery, which being the subject of litigation is held by him as trustee for another party, or which belongs or is due to another party, the Court may order the same—upon motion—to be deposited in Court or delivered to such party upon such conditions as may be just, subject to further directions of the Court.

Arkansas.—The equitable principles of interpleader are followed, *Temple v. Lawson* (1857), 19 Ark. 148; and extend to sheriff's, *Lawson v. Jordan* (1858), 19 Ark. 297. Code provisions are also in force, under which stakeholders and sheriffs when sued may obtain relief. The following are the sections of the Code of 1884, but it lies in the discretion of the Court whether the third party claiming will be substituted for the defendant, *Ferguson v. Ehrenberg* (1882), 39 Ark. 420.

Section 4947. Upon affidavit of a defendant before answer in any action upon contract or for the recovery of personal property, that some third party, without collusion with him, has or makes a claim to the subject of the action, and that he is ready to pay or dispose thereof, as the Court may direct, the Court may make an order for the safe keeping, or for the payment or deposit in Court, or delivery of the subject of the action to such person as it may direct, and an order requiring such third party to appear in a reasonable time and maintain or relinquish his claim against the defendant, and in the meantime stay the proceedings.

Section 4948. If such third party being served with a copy of the order fail to appear, the Court may declare him barred of all claim in respect to the subject of the action against the defendant therein. If he appear he shall be allowed to make himself defendant in the action, in lieu of the original defendant, who shall be discharged from all liability to either of the other parties in respect to the subject of the action, upon his compliance with the order of the Court for the payment, deposit, or delivery thereof.

Section 4949. The provisions of the last two preceding sections shall be applicable to an action brought against a sheriff, or other officer, for the recovery of personal property taken by him under an execution, or for the proceeds of such property so taken and sold by him, and the defendants in any such action shall be entitled to the benefit of such provisions against the party in whose favour the execution issued, upon exhibiting to the Court the process under which he acted, with his affidavit that the property, for the recovery of which or its proceeds the action was brought, was taken under such process.

Section 4950. In an action against a sheriff, or other officer, for the recovery of property taken under an execution, the Court may upon the application of the defendant, and of the party in whose favour the execution issued, permit the latter to be substituted as the defendant, security for costs being given.

Bermuda Islands.—In this colony the English Act of 1831 was adopted in 1866 (Session 2, No. 15), which afforded relief to a stakeholder when he had been sued, and to the Provost Marshal General and other officers of the Court; to which was

added a section allowing garnishees to interplead and the following new clause:—"Provided that warehousemen, wharfingers, ship masters, and other carriers claiming no interest in the subject matter of the suit, otherwise than for their reasonable charges as such bailees may have the benefit of this Act without relinquishing their claim for such charges." In 1867, by Session 1, No. 13, this colony also adopted the English interpleader amendments of 1838 (Eng. 1 & 2, Vict. c. 45, s. 2), and 1860 (Eng. 23 & 24 Vict. c. 126, ss. 12-18), in which jurisdiction was given to a Judge, and relief was awarded although the claims might not be connected.

British Columbia has adopted the English Interpleader Code as it stood in 1838, and the provisions are found in section 16 (17) of the Supreme Court Act, Revised Statutes, 1897, c. 56, and in the fifteen rules of Order LVII. of the same Act. For interpleader in the inferior Courts, see County Courts Act Revised Statutes, 1897, c. 52, s. 120-121.

California.—In this State the equitable principles of interpleader are followed on the equity side of the Courts: *Pfister v. Wade* (1880), 56 Cal. 43. On the common law side interpleader is awarded to a stakeholder who is sued or expects to be under section 386 of the Code; *Wells v. Miner* (1885), 25 Fed. Rep. 533. This provision is as follows:

Section 386. A defendant against whom an action is pending on a contract, or for specific personal property; may at any time before answer upon affidavit, that a person not a party to the action makes against him, and without any collusion with him, a demand upon such contract, or for such property, upon notice to such person and the adverse party, apply to the Court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in Court the amount claimed on his contract, or delivering the property or its value to such person as the Court may direct; and the Court may in its discretion make the order. And whenever conflicting claims are or may be made upon a person for or relating to personal property or the performance of an obligation, or any portion thereof, such person may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims among themselves. The order of substitution may be made and the action of interpleader may be maintained, and the applicant or plaintiff be discharged from liability to all or any of the conflicting claimants, although their titles or claims have not a common origin, or are not identical, but are adverse to and independent of one another.

Colorado.—Code of 1899. Section 18. A defendant against whom an action is pending upon contract, or to recover specific, real or personal property, may at any time before answer, upon affidavit that a person not a party to the action, and without collusion with him, makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, apply to the Court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in Court the amount of the debt, or delivering

the property, or its value to such person as the Court may direct, and the Court may, in its discretion make the order.

Connecticut.—The principles of interpleader in equity were early adopted, *Nash v. Smith* (1827), 6 Conn. 421, but no affidavit of the absence of collusion is required. The Courts have sought to extend the remedy by bill of interpleader, so as to do away with the distinction between such bills, and bills in the nature of bills of interpleader. *Consociated v. Staples* (1855), 23 Conn. 594.

Section 1250 of the Revised Statutes of 1887. When any debtor or person having in his hands the effects of another, shall refuse to pay such debt or deliver such effects, on the ground that he is the garnishee in a process of foreign attachment levied thereon, the person to whom such refusal of payment or delivery has been made, may bring his action in the nature of a bill of interpleader against such debtor, the other parties in said process of foreign attachment and any other parties in interest.

Public Acts, 1893. Chapter 42. Whenever any person has, or is alleged to have, any money or other property in his hands or possession, which is claimed by two or more persons, either he, or any of the persons claiming the same, may bring a complaint in equity, in the nature of a bill of interpleader, to any Court which by law has equitable jurisdiction of the parties and amount in controversy, making all persons parties who claim to be entitled to, or interested in, such money or property; and said Court shall hear and dispose of all questions which may arise in such case. See *Union Trust v. Stamford* (1899), 43 Atl. 555; *National Savg. Bank v. Cable* (1901), 48 Atl. 428.

Delaware.—The equitable principles of interpleader are practiced. *Hastings v. Cropper* (1867), 3 Del. Ch. 165, and the following provisions have been enacted. Revised Statutes of 1893, chapter 106.

Section 34. The defendant in any action now pending or which shall be brought in the Supreme Court for the recovery of money, or of any goods, chattels, or the value thereof in damages, which shall have come lawfully to his hands or possession, may at any time after the declaration filed and before plea pleaded, by a suggestion to be filed of record, disclaim all interest in the subject matter of such action, and offer to bring the same into Court or to pay or dispose thereof as the Court shall order, and if he shall also allege under oath or affirmation, that the right thereto is claimed by or supposed to belong to some person not party to the action (naming him or them), who has sued or is expected to sue for the same, or shall show some probable matter to the Court to believe that such suggestion is true, the said Court may thereupon order the plaintiff to interplead with such third person, and make such rules and orders in the cause and issue such process for the purpose of making such third person party to the action, and for carrying such proceedings to interplead into full and complete effect, and may render such judgment or judgments thereon as shall be agreeable to the rules and practice of the law in like cases.

Section 35. If the process issued upon an order to interplead as aforesaid shall not be actually served, or personal notice thereof shall not be given to such third person, the said Court

shall have power, upon giving judgment for the plaintiff to require him to enter into a recognisance, and if they shall think it necessary with sufficient surety, to interplead with such third person, if afterwards and before the expiration of the time which would be allowed to him to prosecute his claim against the defendant, such third person should appear in the said Court, and claim such money or such goods or chattels or the value thereof.

District of Columbia.—Has no Code provision on the subject of interpleader, but makes use of the equitable principles and practice. *Richardson v. Belt* (1898), 13 App. Cas. D. C. 197.

England.—The first of all interpleader statutes was enacted in England on the 20th of October, 1831, entitled an Act to enable Courts of Law to give relief against adverse claims made upon persons having no interest in the subject of such claims. It is chapter 58 of 1 & 2 William IV. and is as follows:

1. Whereas it often happens that a person sued at law for the recovery of money or goods wherein he has no interest, and which are also claimed of him by some third party, has no means of relieving himself from such adverse claims but by a suit in equity against the plaintiff and such third person, usually called a bill of interpleader, which is attended with expense and delay; for remedy thereof be it enacted by the King's most excellent majesty, by and with the advice and consent of the Lords, spiritual and temporal, and Commons in this present Parliament assembled, and by the authority of the same, that upon application made by or on the behalf of any defendant sued in any of his Majesty's Courts of Law at Westminster, or in the Court of Common Pleas of the County Palatine of Lancaster, or the Court of Pleas of the County Palatine of Durham, in any action of assumpsit, debt, detinue or trover, such application being made after declaration, and before plea, by affidavit or otherwise, shewing that such defendant does not claim any interest in the subject matter of the suit, but that the right thereto is claimed or supposed to belong to some third party who has sued or is expected to sue for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into Court or to pay or dispose of the subject matter of the action in such manner as the Court (or any Judge thereof) may order or direct, it shall be lawful for the Court, or any Judge thereof, to make rules and orders calling upon such third party to appear and to state the nature and particulars of his claim and maintain or relinquish his claim and upon such rule or order to hear the allegations as well of such third party as of the plaintiff, and in the meantime to stay the proceedings in such action and finally to order such third party to make himself defendant in the same or some other action, or to proceed to trial on one or more feigned issue or issues, and also to direct which of the parties shall be plaintiff or defendant on such trial, or with the consent of the plaintiff and such third party, their counsel and attorneys, to dispose of the merits of their claims and determine the same in a summary manner, and to make such other rules and orders therein, as to costs and all other matters, as may appear to be just and reasonable.

2. And be it further enacted that the judgment in any such action or issue as may be directed by the Court or Judge, and

the decision of the Court or Judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from or under them.

3. And be it further enacted, that if such third party shall not appear upon such rule or order to maintain or relinquish his claim, being duly served therewith, or shall neglect or refuse to comply with any rule or order to be made after appearance, it shall be lawful for the Court or Judge to declare such third party, and all persons claiming by from or under him, to be for ever barred from prosecuting his claim against the original defendant, his executors or administrators; saving nevertheless the right or claim of such third party against the plaintiff; and thereupon to make such order between the defendant and the plaintiff, as to costs and other matters as may appear just and reasonable.

4. Provided always and be it further enacted, that no order shall be made in pursuance of this Act by a single Judge of the Court of Pleas of the said County Palatine of Durham who shall not also be a Judge of one of the said Courts at Westminster, and that every order to be made in pursuance of this Act by a single Judge not sitting in open Court shall be liable to be rescinded or altered by the Court in like manner as other orders made by a single Judge.

5. Provided also, and be it further enacted that if upon application to a Judge in the first instance or in any later stage of the proceedings he shall think the matter more fit for the decision of the Court, it shall be lawful for him to refer the matter to the Court; and thereupon the Court shall and may hear and dispose of the same in the same manner as if the proceeding had originally commenced by rule of Court instead of the order of a Judge.

6. And whereas difficulties sometimes arise in the execution of process against goods and chattels, issued by or under the authority of the said Courts, by reason of claims made to such goods and chattels by assignees of bankrupts and other persons, not being the parties against whom such process has issued, whereby sheriffs and other officers are exposed to the hazard and expense of actions, and it is reasonable to afford relief and protection in such cases to such sheriffs and other officers; be it therefore further enacted, that when any such claim shall be made to any goods or chattels taken or intended to be taken in execution under any process, or to the proceeds or value thereof, it shall and may be lawful to and for the Court from which such process issued, upon application of such sheriff or other officer, made before or after the return of such process, as well before as after any action brought against such sheriff or other officer to call before them, by rule of Court, as well the party issuing such process as the party making such claim, and thereupon to exercise, for the adjustment of such claims and the relief and protection of the sheriff or other officer, all or any of the powers and authorities hereinbefore contained, and make such rules and decisions as shall appear to be just, according to the circumstances of the case, and the costs of all such proceedings shall be at the discretion of the Court.

7. And be it further enacted, that all rules, orders, matters, and decisions to be made and done in pursuance of this Act,

except only the affidavits to be filed may, together with the declaration in the cause (if any), be entered of record, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times if required and to secure and enforce the payment of costs directed by such order; and every such rule or order so entered shall have the force and effect of a judgment except only as to becoming a charge on any lands, tenements or hereditaments; and in case any costs shall not be paid within fifteen days after notice of the taxation and amount thereof given to the party ordered to pay the same, his agent or attorney, execution may issue for the same by *feri facias* or *capias satisfaciendum* adapted to the case, together with the costs of such entry, and of the execution, if by *feri facias*; and such writ and writs may bear teste on the day of issuing the same, whether in term or vacation; and the sheriff or other officer executing any such writ shall be entitled to the same fees, and no more, as upon any similar writ grounded upon a judgment of the Court.

8. And whereas by a certain Act made and passed in the last session of Parliament, entitled "An Act to improve the Proceedings in Prohibition and on writs of Mandamus" it was, among other things enacted, that it should be lawful for the Court to which application may be made for any such writ of mandamus as is therein in that behalf mentioned, to make rules and orders calling not only upon the person to whom such writ may be required to be issued, but also all and every other person having or claiming any right or interest in or to the matter of such writ, to shew cause against the issuing of such writ and payment of the costs of the application, and upon the appearance of such other person in compliance with such rules, or, in default of appearance after service thereof, to exercise all such powers and authorities, and to make all such rules and orders applicable to the case, as were or might be given or mentioned by or in the Act passed during that present session of Parliament for giving relief against adverse claims made upon persons having no interest in the subject of such claims; and whereas no such Act was passed during the then present session of Parliament, be it therefore enacted that upon any such application, as is in the said Act and hereinbefore mentioned, it shall be lawful for the Court to exercise all such powers and authorities, and make all such rules and orders applicable to the case, as are given or mentioned by or in this present Act.

By 1 & 2 Vict. c. 45, s. 2, a Judge of the Common Law Courts was given the same jurisdiction in sheriff's interpleader as 1 & 2 Will. IV., c. 58, had conferred upon the Common Law Courts.

By 8 & 9 Vict. c. 109, s. 19, the proceedings by way of feigned issues were abolished.

In 1860 the following important amendments were made to the Act of 1831, by 23 & 24 Vict. c. 126. 12. Where an action has been commenced in respect of a common law claim for the recovery of money or goods, or where goods or chattels have been taken or are intended to be taken in execution under process issued from any one of the Superior Courts, or from the Court of Common Pleas at Lancaster or the Court of Pleas at

Durham, and the defendant in such action, or the sheriff or other officer, has applied for relief under the provisions of an Act made and passed in the Session of Parliament held in the first and second years of the reign of his late Majesty King William the Fourth intituled an Act to enable Courts of law to give relief against adverse claims made upon persons having no interest in the subject of such claim." It shall be lawful for a Court or a Judge to whom such application is made to exercise all the powers and authorities given to them by this Act and the hereinbefore mentioned Act passed in the session of Parliament held in the first and second years of the reign of his late Majesty King William the Fourth, *though the titles of the claimants to the money, goods or chattels in question, or to the proceeds or value thereof, have not a common origin, but are adverse to and independent of one another.*

13. When goods or chattels have been seized in execution by a sheriff or other officer under process of the above mentioned Courts, and some third person claims to be entitled, under a bill of sale or otherwise, to such goods or chattels, by way of a security for a debt, the Court or a Judge may order a sale of the whole or part thereof, upon such terms as to payment of the whole or part of the secured debt or otherwise as they or he shall think fit, and may direct the application of the proceeds of such sale in such manner and upon such terms as to such Court or Judge may seem just.

14. Upon the hearing of any rule or order calling upon persons to appear and state the nature and particulars of their claims, it shall be lawful for the Court or Judge wherever, from the smallness of the amount in dispute or of the value of the goods seized, it shall appear to them or him desirable and right so to do at the request of either party to dispose of the merits of the respective claims of such parties, and to determine the same in a summary manner, upon such terms as they or he shall think fit to impose, and to make such other rules and orders therein as to costs and all other matters as may be just.

15. In all cases of interpleader proceedings where the question is one of law, and the facts are not in dispute, the Judge shall be at liberty at his discretion, to decide the question without directing an action or issue, and, if he shall think it desirable to order that a special case be stated for the opinion of the Court.

16. The proceedings upon such case shall, as nearly as may be, be the same as upon a special case stated under "The C. L. P. Act, 1852," and error may be brought upon such case; and the provisions of "The C. L. P. Act, 1854," as to bringing error upon a special case shall apply to the proceedings in error upon a special case under this Act.

17. The judgment in any such action or issue as may be directed by the Court or judge in any interpleader proceedings, and the decision of the Court or judge in a summary manner shall be final and conclusive against the parties and all persons claiming by, from or under them.

18. All rules, orders, matters, and decisions to be made and done in interpleader proceedings under this Act (excepting only any affidavits), may, together with the declaration in the cause,

if any, be entered of record, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times, if required, and, to secure and enforce the payment of costs directed by any such rule or order, and every such rule or order so entered shall have the force and effect of a judgment in the Superior Courts of Common Law.

Rules of 1875—Order I., Rule 2. With respect to interpleader, the procedure and practice now used by Courts of Common Law under the Interpleader Acts, 1 & 2 Will. IV., c. 58, and 23 & 24 Vict. c. 126, shall apply to all actions and all the divisions of the High Court of Justice, and the application by a defendant shall be made at any time after being served with a writ of summons and before delivering a defence.

Since the 24th of October, 1883, the following provisions, founded on the original Act of 1831 and amendments, govern, being Order LVII. of the Rules of 1883.

1. Relief by way of interpleader may be granted. (a) Where the person seeking relief (in this order called the applicant) is under liability for any debt, money, goods or chattels, for or in respect of which he is, or expects to be, sued by two or more parties (in this order called the claimants) making adverse claims thereto. (b) Where the applicant is a sheriff or other officer charged with the execution of process by or under the authority of the High Court, and claim is made to any money, goods, or chattels taken or intended to be taken in execution under any process, or to the proceeds or value of any such goods or chattels by any person other than the person against whom the process issued.

2. The applicant must satisfy the Court or a Judge by affidavit or otherwise—(a) That the applicant claims no interest in the subject matter in dispute other than for charges or costs; and (b) That the applicant does not collude with any of the claimants; and (c) That the applicant, except where he is a sheriff or other officer charged with the execution of process by or under the authority of the High Court, who has seized goods, and who has withdrawn from possession in consequence of the execution creditor admitting the claim of the claimant under Rule 16 of this order, is willing to pay or transfer the subject-matter into Court, or to dispose of it as the Court or a Judge may direct. (Amended 1896.)

3. The applicant shall not be dis-entitled to relief by reason only that the titles of the claimants have not a common origin, but are averse to and independent of one another.

4. Where the applicant is a defendant, application for relief may be made at any time after service of the writ of summons.

5. The applicant may take out a summons calling on the claimants to appear and state the nature and particulars of their claims, and either to maintain or relinquish them.

6. If the application is made by a defendant in an action the Court or a Judge may stay all further proceedings in the action.

7. If the claimants appear in pursuance of the summons, the Court or a Judge may order either that any claimant be made a defendant in any action already commenced in respect of the subject-matter in dispute, in lieu of or in addition to the

applicant, or that an issue between the claimants be stated and tried, and in the latter case may direct which of the claimants is to be plaintiff and which defendant.

8. The Court or a Judge may, with the consent of both claimants, or on the request of any claimants, if, having regard to the value of the subject-matter in dispute it seems desirable so to do, dispose of the merits of their claims, and decide the same in a summary manner and on such terms as may be just.

9. Where the question is a question of law and the facts are not in dispute, the Court or a Judge may either decide the question without directing the trial of an issue, or order that a special case be stated for the opinion of the Court. If a special case is stated Order XXXIV. shall as far as applicable apply thereto.

10. If a claimant having been duly served with a summons calling on him to appear and maintain, or relinquish, his claim, does not appear in pursuance of the summons, or having appeared, neglects or refuses to comply with any order made after his appearance, the Court or a Judge may make an order declaring him, and all persons claiming under him, forever barred against the applicant, and persons claiming under him; but the order shall not affect the rights of the claimants as between themselves.

11. Except where otherwise provided by statute, the judgment in any action or on any issue ordered to be tried or stated in an interpleader proceeding, and the decision of the Court or a Judge in a summary way, under Rule 8 of this order, shall be final and conclusive against the claimants and all persons claiming under them, unless by special leave of the Court or Judge, as the case may be, or of the Court of Appeal.

12. When goods or chattels have been seized in execution by a sheriff or other officer charged with the execution of process of the High Court, and any claimant alleges that he is entitled under a bill of sale or otherwise, to the goods or chattels by way of security for debt, the Court or a Judge may order the sale of the whole or a part thereof, and direct the application of the proceeds of the sale in such manner and upon such terms as may be just.

13. Orders XXXI. and XXXVI. shall with the necessary modifications, apply to an interpleader issue; and the Court or Judge who tries the issue may finally dispose of the whole matter of the interpleader proceedings, including all costs not otherwise provided for.

14. Where in any interpleader proceeding it is necessary or expedient to make one order in several causes or matters pending in several divisions, or before different Judges of the same division, such order may be made by the Court or Judge before whom the interpleader proceeding may be taken, and shall be entitled in all such causes or matters; and any such order (subject to the right of appeal) shall be binding on the parties in all such causes or matters.

15. The Court or a Judge may, in or for the purposes of any interpleader proceedings, make all such orders as to costs, and all other matters, as may be just and reasonable.

16. Where a claim is made to or in respect of any goods or chattels taken in execution under the process of the Court,

it shall be in writing; and upon the receipt of the claim, the sheriff or his officer shall forthwith give notice thereof to the execution creditor according to form 28 in appendix B, or to the like effect, and the execution creditor shall, within four days after receiving the notice, give notice to the sheriff or his officer that he admits or disputes the claim according to form 29 in appendix B, or to the like effect. If the execution creditor admits the title of the claimant and gives notice as directed by this rule, he shall only be liable to such sheriff or officer for any fees and expenses incurred prior to the receipt of the notice admitting the claim. (Added 1889.)

16a. When the execution creditor has given notice to the sheriff or his officer that he admits the claim of the claimant, the sheriff may thereupon withdraw from possession of the goods claimed, and may apply for an order protecting him from any action in respect of the said seizure and possession of the said goods, and the Judge or Master may make any such order as may be just and reasonable in respect of the same: Provided always that the claimant shall receive notice of such intended application, and, if he desires it, may attend the hearing of the same, and, if he attend, the Judge or Master may, in and for the purposes of such application, make all such orders as to costs as may be just and reasonable. (Added 1896.)

17. Where the execution creditor does not in due time, as directed by the last preceding rule, admit or dispute the title of the claimant to the goods or chattels, and the claimant does not withdraw his claim thereto by notice in writing to the sheriff or his officer, the sheriff may apply for an interpleader summons to be issued; and should the claimant withdraw his claim by notice in writing to the sheriff or his officer, or the execution creditor in like manner serve an admission of the title of the claimant prior to the return day of such summons, and at the same time give notice of such admission to the claimant, the Judge or Master may, in and for the purposes of the interpleader proceedings, make all such orders as to costs, fees, charges and expenses, as may be just and reasonable. (Added 1889.)

23 & 24 Vict. c. 126 (Common Law Procedure Act, 1860), section 17. The judgment in any such action or issue as may be directed by the Court or Judge in any interpleader proceedings, and the decision of the Court or Judge in a summary manner shall be final and conclusive against the parties and all persons claiming by, from or under them.

36 & 37 Vict. c. 66 (Judicature Act, 1873), section 25, subsection 6. Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to be effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt and chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the

concurrence of the assignor: Provided always that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or anyone claiming under him, or of any other opposing and conflicting claims to such debt or chose in action, he shall be entitled if he think fit, to call upon the several persons making claim thereto to *interplead* concerning the same or he may, if he think fit pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees.

If it shall appear to a Court or a Judge that any proceeding now pending or hereafter commenced in the High Court of Justice, by way of interpleader, in which the amount or value of the matter in dispute does not exceed the sum of 500 pounds . . . may be more conveniently tried and determined in a County Court, the Court or Judge may at any time order the transfer thereof to any County Court in which an action or proceeding might have been brought by any one or more of the parties to such interpleader against the others or other of them, if there had been a trust to be executed concerning the matter in question; and every such order shall have the same effect as if it had been for the transfer of a suit or proceeding under section 8 of the County Courts Act, 1867 (now replaced by section 69 of the County Courts Act, 1888); and the County Court shall have jurisdiction and authority to proceed therein, as may be prescribed by any County Court rules for the time being in force (47 & 48 Vict. c. 61, s. 17, Judicature Act, 1884).

Interpleader in English County Courts.

Every inferior Court which now has, or which may after the passing of this Act have, jurisdiction in equity, or at law and in equity, and in Admiralty respectively, shall, as regards all causes of action within its jurisdiction, for the time being have power to grant, and shall grant in any proceeding before such Court, such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counter claim, equitable or legal . . . in as full and ample a manner as might or ought to be done in the like case by the High Court of Justice. (36 & 37 Vict. c. 66, section 89, Judicature Act, 1873.) See *Speers v. Daggers* (1885), 1 C. & E. 503.

If any claim shall be made to or in respect of any goods or chattels taken in execution, or in respect of the proceeds or value thereof, by any person, it shall be lawful for the registrar, upon the application of the high bailiff, as well before as after any action brought against him, to issue a summons calling before the Court as well the party issuing such process as the party making such claim, and the Judge shall adjudicate upon such claim and make such order between the parties in respect thereof and of the costs . . . the proceedings as he shall think fit, and shall also adjudicate between such parties, or either of them, and the high bailiff, with respect to any damage or claim of, or to damages arising or capable of arising out of the execution of such process by the high bailiff, and make such order in respect thereof, and of the costs of the proceedings, as to him

shall seem fit; and such orders shall be enforced in like manner as any order in any action brought in such Court, and shall be final and conclusive as between the parties, and as between them or either of them and the high bailiff, unless the decision of the Court shall be in either case, appealed from; and upon the issue of the summons any action which shall have been brought in any Court in respect of such claim, or of any damage arising out of the execution of such process, shall be stayed. (51 & 52 Vict. c. 43, s. 157, County Courts Act, 1888.)

English County Court Rules (1889) Order XXVII.

1. Where a claim is made to or in respect of any goods or chattels taken in execution under the process of a Court it shall be in writing, and thereupon the high bailiff shall forthwith send notice to the execution creditor according to the form in the Appendix, and if the execution creditor admits the title of the claimant to the goods or chattels, and sends notice in due course of post to the high bailiff of such admission, according to the form in the Appendix, or to the like effect, he shall only be liable to such high bailiff for any fees of possession or expenses incurred prior to the receipt of such notice; and the Judge may, if he shall think fit, on application by the high bailiff, make an order for payment of any such fees or expenses by the execution creditor to the high bailiff. Any such application shall be made in writing and intituled, in the matter of the execution, and three clear days' notice in writing thereof shall be given by the high bailiff to the execution creditor.

1A. (b) The high bailiff shall also forthwith send notice to the claimant according to the Form 179c in the Appendix, requiring him to make deposit or give security in accordance with section 156 of the Act.

1B. (c) Where the execution creditor gives notice in due time to the high bailiff as directed by Rule 1 of this Order, that he admits the title of the claimant to the goods and chattels, the high bailiff may thereupon withdraw from possession and may apply for an order protecting him from any action in respect of the seizure and possession of said goods and chattels, and the Judge may make any such order as may be just and reasonable in respect of the same. Any such application shall be made in writing and intituled, in the matter of the execution, and three clear days' notice in writing thereof shall be given by the high bailiff to the claimant, who may, if he desires it, attend the hearing of the application, and if he attend the Judge may, in and for the purposes of this application, make all such orders as to costs as may be just and reasonable.

2. Where the execution creditor does not in due time, as directed by Rule 1 of this Order, admit the title of the claimant to the goods or chattels, and the claimant persists in his claim thereto, the high bailiff shall apply for an interpleader summons to be issued, and should the claimant withdraw his claim or execution creditor file an admission of the title of the claimant prior to the return-day of such summons, and at the same time give notice of such admission to the claimant, the Judge may, in and for the purposes of the interpleader proceedings, make all such orders as to costs, fees, charges, and expenses as may be just and reasonable.

3. Where any claim is made to or in respect of any goods or chattels, taken in execution or in respect of the proceeds or value thereof, and summonses have been issued on the application of the high bailiff, such summonses shall be served in such time and mode as by these rules directed for an ordinary summons to appear to a plaintiff, and the case shall proceed as if the claimant were the plaintiff and the execution creditor the defendant; provided that where the claimant has not made deposit or given security in accordance with section 156 of the Act, the time of service may, if the high bailiff so desires by leave of the Judge or Registrar, be such time as will obtain a speedy decision on the claim.

4. (d) The claimant shall, five clear days at least before the return-day, deliver to the high bailiff, or leave at the office of the registrar two copies of the particulars of any goods or chattels alleged to be the property of the claimant and of the grounds of his claim, and in case of a claim for rent of the amount thereof, and for what period, and in respect of what premises the same is declared to be due, and the name, address, and description of the claimant shall be duly set forth in such particulars, and the high bailiff shall forthwith send by post to the execution creditor or his solicitor one of the copies of such particulars. Any money paid into Court under the execution shall be retained by the registrar until the claim shall have been adjudicated upon, provided that by consent of all parties or without such consent, if the Judge shall so direct, an interpleader claim may be tried although the rule has not been complied with.

5. The Judge upon the hearing shall adjudicate upon any claim of the high bailiff for possession fees, and may, if he shall think fit, order the same or such part thereof as he may think just to be paid by the claimant or by the execution creditor.

6. In the event of the claimant of any goods taken in execution not making, in accordance with the provisions of section 156 of the Act, a deposit with the bailiff either of the amount of the value of the goods claimed, or of the sum which the bailiff is allowed to charge as costs for keeping possession of such goods until a decision can be obtained, the bailiff may in his discretion delay selling such goods until the Judge shall have adjudicated on such claim, and for the keeping of such continued possession he shall be allowed such costs out of pocket only as the Judge may order.

7. Where the claimant to goods taken in execution claims damages from the execution creditor, or from the high bailiff, for or in respect of the seizure of the goods, he shall, in the particulars of his claim to the goods, state the amount he claims for damages and the grounds upon which he claims damages.

8. Where an execution creditor claims damages against a high bailiff arising out of the execution of any process he shall, five clear days before the return-day, deliver to the high bailiff a notice of such claim, stating the grounds and amount, of such claim.

9. Where a claim for damages under section 157 of the Act is made against the high bailiff and execution creditor, or either of them, they or either of them may pay into Court money in full satisfaction of such claim for damages, and such pay-

ment into Court shall be made in the same manner and have the same effect, and the parties respectively shall have the same rights and remedies as they would respectively have if the proceeding were an action in which the claimant was plaintiff and the high bailiff and judgment creditors defendants.

10. Interpleader summonses shall be issued by the registrar on the application of the high bailiff without leave of the Judge, and shall be served on the solicitor of any party who acts by a solicitor.

11. Interpleader summonses shall be issued from the Court of the district in which the levy was made, and the execution creditor and the claimant shall be summoned to such Court.

12A. (a) When goods or chattels have been seized in execution under process of the Court, and any claimant alleges that he is entitled under a bill of sale or otherwise, to such goods or chattels by way of security for debt, the Judge may order a sale of the whole or part thereof, and may direct the application of the proceeds of such sale in such manner and upon such terms as may be just. A duplicate of such order shall be delivered by the registrar to the high bailiff, who shall thereupon forthwith sell the goods or chattels pursuant to the order, and after deducting the expenses of the sale, and the taxes, and rent, if any, directed by the owner to be paid, shall pay the balance of the proceeds into Court, and such balance shall thereupon be applied by the registrar in accordance with the directions contained in the order of the Court.

12B. (a) The order made upon the hearing of an interpleader summons shall be according to such of the forms in the Appendix as shall be applicable to the case, and such order shall contain directions as to how any moneys paid into Court in the proceedings are to be disposed of.

12C. (b) Forms 182 to 192, 196, 197 and 199 in the Appendix to the County Court Rules, 1889, are hereby annulled, and Forms 182a to 192a, 196a, 197a and 199a in the Appendix shall stand in lieu thereof.

13A. (c) Where the defendant in an action brought by the assignee of a debt or chose in action has had notice that the assignment is disputed as to the whole or any part of such debt or chose in action by the assignor or any one claiming under him—or where the defendant in any such action, or in any other action for any debt, chose in action, money, goods or chattels has had notice of any other opposing or conflicting claims to the whole or any part of such debt, chose in action, money goods or chattels—such defendant may, within five days of the service of the summons, apply to the registrar for a summons against the assignor or the person making such opposing or conflicting claim hereinafter called the claimant.

(2) The defendant must satisfy the registrar by affidavit according to the Form 134a in the Appendix, that he claims no interest in the subject-matter in dispute, other than for charges or costs, and does not collude with either the plaintiff or the claimant, and is willing to pay or transfer the subject-matter into Court, or dispose of it as the Court may direct. On filing such affidavit, the defendant shall lodge with the registrar copies thereof for the plaintiff and the claimant.

(3) The defendant shall not be disentitled to relief by reason only that the titles of the plaintiff and the claimant have not a common origin, but are adverse to and independent of each other.

(4) The registrar shall, on being satisfied as aforesaid, issue for service on the claimant an interpleader summons according to the Form 135a in the Appendix, returnable as soon as conveniently may be, and shall annex thereto a copy of the original summons and of the defendant's affidavit, and shall adjourn the trial of the action to the day on which the interpleader summons is made returnable, and shall give notice to the plaintiff and defendant of the issue of the interpleader summons and of the adjournment of the trial of the action, according to the Forms 135b and 135c in the Appendix.

(5) The claimant shall, five clear days at least before the return day of the interpleader summons, leave at the office of the registrar, either three copies of a notice that he relinquishes his claim, or three copies of particulars stating the grounds on which he disputes the assignment, or founds his claim to the subject matter in the action, and the registrar shall forthwith send by post one of such copies to the plaintiff or his solicitor, and one other of such copies to the defendant or his solicitor. Provided that by consent of all parties, or without such consent if the Judge shall so direct, the interpleader may be tried although this rule has not been complied with.

(6) On filing his affidavit, or any time after the issue of the interpleader summons, the defendant may pay the debt or money, or bring the chose in action, goods or chattels into Court to abide its decision.

(7) Upon the return day of the interpleader summons—(a) If the plaintiff does not appear, the action and interpleader summons shall be struck out, and the Judge may make such order as to costs as may be just. (b) If the claimant does not appear, the Judge shall hear and determine the action as between the plaintiff and the defendant, and may make an order declaring the claimant and all persons claiming under him for ever barred against the defendant, and all persons claiming under him, and may make such order as to costs against the claimant as may be just, but the order shall not affect the rights of the plaintiff and the claimant between themselves, or if the claimant has filed notice that he relinquishes his claim, the Judge may make an order declaring him and all persons claiming under him for ever barred against both the plaintiff and defendant, and all persons claiming under them, and may make such order against the claimant as to costs incurred by the other parties before the receipt of notice of relinquishment as may be just. (c) If both the plaintiff and the claimant appear, the Judge shall, whether the defendant does or does not appear, hear the cases of the plaintiff and claimant (and the case of the defendant if he appears), and shall give such judgment thereon as shall finally determine the rights and claims of all parties, but the Judge shall not make any order in favour of the claimant against the defendant unless the claimant requests him so to do.

(8) Orders XVI. and XXII. shall with the necessary modifications apply to the interpleader proceedings, and the Judge may

in and for the purposes of any such proceedings make all such orders as to costs and all other matters (including the repayment to the defendant of any costs paid by him into Court and the disposal of any money, chose in action, goods or chattels paid or brought by the defendant into Court), as may be just and reasonable.

Interpleader in the London Mayor's Court.

Upon application made by or on behalf of any defendant in any action in the Court, such application being made after declaration, and, before plea, by affidavit or otherwise, showing that such defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed, or supposed to belong to, some third party, who has sued or is expected to sue for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into Court or to pay or dispose of the subject-matter of the action in such a manner as the Court may order or direct, it shall be lawful for the registrar to issue a summons calling upon such third party to appear in Court and to state the nature and particulars of his claim, and to maintain or relinquish his claim, which summons may be served upon such third party in any part of England or Wales; and upon such summons the Court may hear the allegations as well of such third party as of the plaintiff, and in the meantime stay the proceedings in such action, and finally order such third party to make himself defendant in the same or some other action, or to proceed to trial on one or more issue or issues; and also direct which of the parties shall be plaintiff or defendant on such trial, or, with the consent of the plaintiff and such third party, their counsel or attorneys, dispose of the merits of their claims, and determine the same in a summary manner, and make such rules and orders therein, as to costs and all other matters, as may appear to be just and reasonable. (20 & 21 Vict. c. civil., a. 32, The Mayor's Court of London Procedure Act.)

When any claim shall be made to or in respect of any goods or chattels taken or intended to be taken in execution under the process of the Court, or to or in respect of the proceeds or value thereof, by any landlord for rent, or by any person not being the party against whom such process has issued, it shall be lawful to and for the registrar upon application of the serjeant-at-mace or any of his officers, made before or after the return of such process, and as well before as after any action brought against such serjeant-at-mace or any of his officers, to issue a summons calling before the Court as well the party issuing such process as the party making such claim, and thereupon any action which shall have been brought in any of the Superior Courts, or in any local or inferior Court of record, in respect of such claim, shall be stayed, and the Court in which such action shall have been brought, or any Judge thereof, on proof of the issue of such summons, and that the goods and chattels were so taken in execution, may order the party bringing such action to pay the costs of all proceedings had upon such action after the issue of such summons; and the said Court shall thereupon exercise for the adjustments of such claim, and relief and protection of the said serjeant-at-mace, or

any of his officers, all or any of the powers and authorities hereinbefore contained, and make such rules and decisions as shall appear to be just, according to the circumstances of the case; and the costs of all such proceedings shall be in the discretion of the Court. (20 & 21 Vict. c. civil., s. 35.)

Florida.—Bills of interpleader are employed, and the equitable principles applicable are followed: *Namnis v. L'Engle* (1882), 19 Fla. 800. There is no statutory interpleader.

Georgia.—In Georgia the following Code provisions have been enacted (Code 1895).

Section 4896. Whenever a person is possessed of property or funds, or owes a debt or duty to which more than one person lays claim, and the claims are of such a character as to render it doubtful or dangerous for the holder to act, he may apply to equity to compel the claimants to interplead.

Section 4897. Every petition for interpleader should be verified, and should show that the petitioner is not in collusion with either party claiming the property.

Section 4898. If, in the progress of any proceeding in equity, the Court perceives the necessity for parties to interplead, it may order such interpleader as collateral and ancillary to the main case.

See *Adams v. Dixon* (1856), 19 Ga. 513; *Burton v. Black* (1861), 32 Ga. 53.

Hawaiian Islands.—By chapter 23 of the Acts of 1876 these Islands adopted what is almost a transcript of the English Interpleader Acts of 1831 and 1860, 1 & 2 Wm. IV., c. 58, secs. 1, 2, 3, 5 and 6; and 23 & 24 Vict. c. 126, sections 12, 13 14, 15 and 17. The relief is allowed to the defendant in any personal action, who claims no interest in the subject of the suit, but shows that the right thereto is claimed by or supposed to belong to some third party who has sued or is expected to sue for the same; and also to marshals and sheriffs when conflicting claims are made to goods and chattels taken in execution whether an action has been brought or not. See *Compiled Laws of the Hawaiian Dependency*, published in Honolulu (1884), page 381. In *re Akana* (1879), 6 Hawaii R. 254; *Cartwright v. Hoffnung* (1886), 6 Hawaii R. 601.

Idaho.—The Code of this State (1887), has the following provision relating to interpleader.

Section 4109. A defendant against whom an action is pending upon a contract or for specific personal property may at any time before answer upon affidavit that a person not a party to the action makes against him, and without any collusion with him, a demand upon the same contract or for the same property, upon notice to such person and the adverse party, apply to the Court for an order to substitute such person in his place and discharge him from liability to either party, on his depositing in Court the amount claimed on the contract or delivering the property or its value to such person as the Court may direct, and the Court may in its discretion make the order.

Section 4110. Whenever conflicting claims are or may be made upon a person for or relating to personal property, or the performance of an obligation, or any portion thereof, such

person may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims among themselves. The order of substitution may be made and the action of interpleader may be maintained, and the applicant or plaintiff be discharged from liability to all or any of the conflicting claimants, although their titles or claims have not a common origin, or are not identical, but are adverse to and independent of one another.

Illinois.—In this State bills of interpleader are employed. *Schneider v. Seibert* (1869), 50 Ill. 284; *Newhall v. Kastens* (1873), 70 Ill. 156; *Cogswell v. Armstrong* (1875), 77 Ill. 139; *Livingstone v. Bank of Montreal* (1893), 50 Ill. App. 562. There is no statutory interpleader, although in the procedure known as "Intervention," a borrowed use is made of the terms "interplead," "interpleader," "by way of interpleader," which makes some confusion in the General Digests.

India.—Act 14 of 1882, chapter 33, Interpleader.

470. When two or more persons claim, adversely to one another, the same payment or property from another person, whose only interest therein is that of a mere stakeholder, and who is ready to render it to the right owner, such stakeholder may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to whom the payment or property should be made or delivered, and of obtaining indemnity for himself. Provided that, if any suit is pending in which the rights of all parties can properly be decided, the stakeholder shall not institute a suit of interpleader.

471. In every suit of interpleader the plaintiff must, in addition to the other statements necessary for plaints, state (a) that the plaintiff has no interest in the thing claimed otherwise than as a mere stakeholder; (b) the claims made by the defendants severally; and (c) that there is no collusion between the plaintiff and any of the defendants.

472. When the thing claimed is capable of being paid into Court, or placed in the custody of the Court, the plaintiff must so pay or place it before he can be entitled to any order in the suit.

473. At the first hearing the Court may (a) declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award him his costs, and dismiss him from the suit; or, if it thinks that Justice or convenience so require, (b) retain all parties until the final disposition of the suit; and, if it finds that the admissions of the parties or other evidence enable it, (c) adjudicate the title to the thing claimed; or else it may (d) direct the defendants to interplead one another by filing statements and entering into evidence for the purpose of bringing their respective claims before the Court, and shall adjudicate on such claims.

474. Nothing in this chapter shall be taken to enable agents to sue their principals, or tenants to sue their landlords, for the purpose of compelling them to interplead with any persons other than person making claim through such principals or landlords.

475. When the suit is properly instituted, the Court may provide for the plaintiff's costs by giving him a charge on the thing claimed, or in some other effectual way.

476. If any of the defendants in an interpleader suit is actually suing the stakeholder in respect of the subject of such suit, the Court in which the suit against the stakeholder is pending shall, on being duly informed by the Court which passed the decree in the interpleader suit in favour of the stakeholder that such decree has been passed, stay the proceedings as against him; and his costs in the suit so stayed may be provided for in such suit; but if, and so far as, they are not provided for in that suit, they may be added to his costs incurred in the interpleader suit.

See *Bombay, etc., Ry. v. Sassoon* (1893), 18 Bombay, 231.

Indiana.—In this State from an early date the equitable principles of interpleader have been followed: *McGarrah v. Prether* (1824), 1 Blackf. 299; *Crane v. Burntrager* (1848), 1 Carter, 165; *Ketcham v. Brazil* (1883), 38 Ind. 515. The following provision appears in the Revised Statutes of 1888.

Section 273. A defendant against whom an action is pending upon a contract, or for specific, real or personal property, may at any time before answer upon affidavit that a person not a party to the action, and without collusion with him, makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, apply to the Court for an order to substitute such person in his place and discharge him from liability to either party, on his depositing in Court the amount of the debt or delivering the property or its value to such person as the Court may direct, and the Court may in its discretion make the order.

Indian Territory.—The civil procedure in force in this Territory, is the procedure adopted by the State of Arkansas: *Standley v. Roberts* (1894), 59 Fed. Rep. p. 841.

Iowa.—Code of 1897.

Section 2487. Upon affidavit of a defendant before answer, in any action of contract or for the recovery of personal property, that some third party without collusion with him has or makes a claim to the subject of the action, or on proof thereof as the Court may direct, the Court may make an order for the safe keeping, or for the payment or deposit in Court or delivery of the subject of the action to such person as it may direct, and an order requiring such third person to appear in a reasonable time and maintain or relinquish his claim against the defendant and in the meantime stay the proceedings. If such third party being served with a copy of the order, fails to appear, the Court may declare him barred of all claim in respect to the subject of the action against the defendant therein. If such third person appears he shall be allowed to make himself defendant in the action in lieu of the original defendant, who shall be discharged from all liability to either of the other parties, in respect to the subject of the action upon his compliance with the order of the Court, for payment, deposit or delivery thereof.

Section 2488. The provisions of the last section shall be applicable to an action brought against a sheriff or other

officer for the recovery of personal property taken by him under attachment or execution, or for the value of such property so taken and sold by him, and the defendant in any such action shall be entitled to the benefit of these provisions against the party in whose favour the attachment or execution issued, upon exhibiting to the Court the process under which he acted, with his affidavit that the property, for the recovery of which, or its proceeds, the action was brought, was taken under such process.

Section 3489. In an action against a sheriff, or other officer, for the recovery of property taken under an attachment or execution, the Court may, upon the application of the defendant and of the party in whose favour the process issued, permit the latter to be substituted as defendant, sureties for the costs being given.

A sheriff may interplead under section 3489 after he has delivered an answer in the action against him notwithstanding sections 3487 and 3488: *Birby v. Blair* (1881), 56 Iowa, 416.

Ireland in 1846 adopted the English Interpleader Act of 1831, by 9 & 10 Vict. I., c. 64, ss. 1-7. In 1877 this Act was superseded, and the provisions in the English Judicature Act of 1873 and 1875 were adopted, the Irish Act being 40 & 41 Vict. I., c. 57, s. 28 (6) and Rule 12 in the Schedule. On June 1st, 1891, the present English Rules were adopted and the Irish Order LVII. is practically the same as the English Order LVII.

Japan.—Section 63 of the Code of Civil Procedure of 1891.

A person proceeded against as possessor of a thing, which he asserts he possesses in the name of a third person, can, if prior to the oral proceedings in the suit he designates the third person and applies for the summoning of such person to make his declaration with respect thereto, refuse to proceed orally with the suit until such declaration is made or until the time appointed for the third person to make the same has expired.

If the third person disputes the defendant's assertion or fails to declare himself, the defendant is entitled to satisfy the plaintiff's demand.

If the assertions of the defendant are acknowledged by the third person to be correct, the latter is entitled, with the consent of the defendant, to take over the suit in his place.

If the third person has taken over the suit, the defendant is on his application to be permitted to retire from the suit. The decision, so far as it concerns the thing itself, operates, and is capable of execution, against the defendant also.

Kansas.—The equitable principles of interpleader are recognized, while relief by statute is granted when an action has been commenced by one of the claimants. General Statutes, 1899.

Section 4287 (43). Upon affidavit of a defendant, before answer in any action upon contract, or for the recovery of personal property, that some third party, without collusion with him has or makes a claim to the subject of the action, and that he is ready to pay or dispose of the same as the Court may direct, the Court may make an order for the safe keeping, or for the payment or deposit in Court or delivery of the subject of the action, to such persons as it may direct, and an order requiring such third party to appear in a reasonable time and

maintain or relinquish his claim against the defendant. If such third person being served with a copy of the order, by the sheriff or such other person as the Court may direct, fail to appear the Court may declare him barred of all claim in respect to the subject of the action, against the defendant therein. If such third party appear he shall be allowed to make himself defendant in the action, in lieu of the original defendant, who shall be discharged from all liability to either of the other parties in respect to the subject of the action, upon his compliance with the order of the Court for the payment, deposit or delivery thereof.

Section 4288 (44). The provisions of the last section shall be applicable to an action brought against a sheriff or other officer for the recovery of personal property taken by him under execution, or for the proceeds of such property so taken and sold by him, and the defendant in any such action shall be entitled to the benefit of those provisions against the party in whose favour the execution issued, upon exhibiting to the Court the process under which he acted with his affidavit that the property, for the recovery of which, or its proceeds, the action is brought, was taken under such process.

Kentucky.—In this State the principles of interpleader in equity have from an early date been followed: *French v. Howard* (1814), 3 Bibb. 301; *Biggs v. Kouns* (1838), 7 Dana 405; *Starling v. Brown* (1870), 7 Bush. 164. Section 30 of the Civil Code of Practice is as follows:

Upon affidavit of a defendant before answer, in an action upon contract, or for the recovery of personal property, that a person who is not a party to the action, without collusion with him, makes a claim to the subject of the action, and that the affiant is ready to pay or deposit thereof as the Court may direct, the Court may make an order for the safe-keeping of the subject of the action, or for its payment or deposit in court, or for its delivery to such person as the Court may direct, and an order requiring such alleged claimant to appear in a reasonable time and maintain or relinquish his claim against the defendant, and, in the meantime, stay the proceeding. If such alleged claimant, being served with a copy of the order, fail to appear, the Court may declare him barred of all claim in respect to the subject of the action against the defendant therein. If he appear he shall be allowed to make himself defendant in the action, in lieu of the original defendant, who shall be discharged from all liability to either of the other parties in respect to the subject of the action, upon his compliance with the order of the Court for the payment, deposit, or delivery thereof.

Louisiana.—The principles applicable to bills of interpleader in equity are recognized by the Courts of this State: *Louisiana v. Clark* (1883), 16 Fed. Rep. 20; *Freyhan v. Berry* (1897), 49 La. Ann. 305. There is no statutory interpleader, see *Morris v. Cain* (1883), 35 Lou. Ann. 759, as to the remedy by a proceeding in the nature of a bill of interpleader.

Maine.—Bills of interpleader are made use of, *Gardiner v. Emerson* (1898), 91 Me. 530. There is no interpleader statute.

Manitoba.—The Queen's Bench Act, 1895.

Section 39 (5). In case of an assignment of a debt or other chose in action, if the debtor, trustee or other person, liable in respect of the debt or chose in action, shall have had notice that such assignment is disputed by the assignor or any person claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled if he think fit to call upon the several persons making claim thereto to interplead concerning the same.

Rule 894. Relief by way of interpleader may be granted (a) When the person seeking relief (hereinafter called the applicant) is under liability for any debt, money, goods or chattels, for or in respect of which he is or expects to be sued by two or more parties (hereinafter called the claimants) making adverse claim thereto. (b) Where the applicant is a sheriff or other officer charged with the execution of process by or under the authority of the Court, and claim is made to any money, goods or chattels, taken or intended to be taken in execution under any process, or under a writ of or order for an attachment, or to the proceeds or value of any such goods or chattels by any person other than the person against whom the process issued, or by any landlord for rent, or by any second or subsequent judgment or execution creditor claiming priority over any previous judgment or execution process or proceeding, or by the party against whom the process was issued claiming that such goods or chattels are exempt from such seizure or sale. Such application may be made within thirty days after receipt of notice of such claim, and not later unless allowed by a Judge on special grounds.

895. The applicant must satisfy the Court or a Judge by affidavit or otherwise: (a) That the applicant claims no interest in the subject matter in dispute other than for charges or costs; and (b) That the applicant does not collude with any of the claimants; and (c) That the applicant is willing to pay or transfer the subject matter into Court or to dispose of it as the Court or a Judge may direct.

896. The applicant shall not be disentitled to relief by reason only that the titles of the claimants have not a common origin, but are adverse to and independent of one another.

897. Where the applicant is a defendant application for relief may be made at any time after service of the statement of claim.

898. The applicant may make a motion calling on the claimants to appear and state the nature and particulars of their claims and either to maintain or relinquish them.

899. If the application is made by a defendant in an action the Court or a Judge may stay all proceedings in the action.

900. If the claimants appear on the motion the Court or a Judge may order either that a claimant be made a defendant in any action already commenced in respect of the subject matter in dispute in lieu of or in addition to the applicant, or that an issue between the claimants be stated and tried, and in the latter case may direct which of the claimants is to be plaintiff and which defendant.

901. A Judge may take evidence upon and dispose of the merits of any such claim in Chambers, and subject to appeal

decide the same in a summary manner and on such terms as may be just.

902. Where the question is a question of law, and the facts are not in dispute, the Court or a Judge may either decide the question without directing the trial of an issue or order that a special case be stated for the opinion of the Court.

903. If so ordered any interpleader issue may be tried by a jury, in which case the order shall set out upon whose application trial by jury has been directed; and such party shall pay the jury fee required by section 74 of the Jury Act and file the receipt therefor with the record, otherwise a Judge may, and when the case is called on for trial the presiding Judge shall, except for special reasons, strike out the provision for trial by jury.

904. An interpleader issue tried in a County Court shall be subject to appeal to the same extent, and subject to the same provisions, as any ordinary cause in a County Court.

905. Interpleader applications made by a sheriff and arising in respect of writs issued to him from a County Court, shall be made in the same manner, and shall be subject to the same rules, and shall be made to the same Judge or Court as if such writs were issued out of the Court of Queen's Bench.

906. Subject to appeal or motion, the judgment or verdict in any interpleader issue, and the decision or order of the Judge in a summary manner, shall in all cases be final and conclusive upon the parties and all persons claiming by, from or under them.

907. If a claimant having been duly served with a notice of motion, calling on him to appear and maintain or relinquish his claim, does not appear in pursuance of the notice, or having appeared neglects or refuses to comply with any order made after his appearance, the Court or Judge may make an order declaring him and all persons claiming under him forever barred against the applicant and persons claiming under him; but the order shall not affect the rights of the claimants as between themselves.

908. Where goods or chattels have been seized in execution by a sheriff or other officer charged with the execution of process of the Court, and any claimant alleges that he is entitled, under a bill of sale or otherwise, to the goods or chattels by way of security for debt, the Court or Judge may order a sale of the whole or a part thereof, and direct the application of the proceeds of the sale in such manner and upon such terms as may be just.

909. In case a sheriff or other officer applies to the Court or Judge for relief by interpleader proceedings, and any execution creditor declines to join in contesting the claim of the adverse claimant, the Court or Judge may direct that such creditors shall be excluded from any benefit which may be derived from the contestation of such claim.

910. The Court or Judge who tries the issue may, and in general, unless there is special reason to the contrary, shall finally dispose of the whole matter of the interpleader proceedings, including all costs not otherwise provided for. Where the Judge does not dispose of the whole matter he shall give a

certificate of his finding, from which there may be an appeal without entry of judgment or further proceeding.

911. Where in any interpleader proceeding it is necessary or expedient to make one order in several actions or matters, such order may be made by the Court or Judge before whom the interpleader proceedings may be taken, and shall be entitled in all such matters or actions, and any such order (subject to the right of appeal) shall be binding on the parties in all such actions or matters.

912. In case a sheriff has more than one writ at the suit or instance of the same or different persons against the same property, it shall not be necessary for him to make a separate application on each writ or in each action; but he may make one application, and make all the persons who are execution creditors parties to said application, and the Court or Judge before whom the application is made shall take such proceedings, and make such order thereon and therein, as if a separate application had been made upon and in respect of each writ.

913. In case there are writs or orders from the Court of Queen's Bench, and one or more County Courts against the same goods, and whether at the suit or instance of the same plaintiff, or of different plaintiffs, the application for such interpleader shall be made to the Court of Queen's Bench or to one of the Judges thereof, or the Referee in Chambers or a Local Judge, and such Court, Judge, Referee or Local Judge, shall dispose of the whole matter, as if all the writs against the goods had been issued from the said Court, and in such case the County Court shall have no cognizance or jurisdiction whatever in the matter.

914. In any such case as in the next preceding two rules mentioned, the Court or a Judge thereof shall make such order with respect to staying proceedings on the several writs, or with respect to directing a sale of the goods or property in question as may be necessary, and with respect to the final disposition or order to be made as to the goods or the proceeds thereof, and in all other matters whatsoever, as fully as if all the writs had been issued from the said Court of Queen's Bench.

915. In case an issue is directed to be tried for the determination of an adverse claim in respect of property seized or taken under an order for writ of attachment or writ of execution, the sheriff (or other officer) to whom such order is delivered or such writ is directed may tax the costs incurred by him in consequence of such adverse claim, and may when taxed serve a copy of the certificate of the same upon each of the parties to the issue; and the attaching or execution creditor shall forthwith pay the same to the said sheriff (in default of which payment a writ of execution may issue to enforce the same), and if successful upon the issue shall tax such costs among his costs of the cause.

916. In case of any such proceedings being compromised between the parties thereto, such costs of the sheriff or other officer shall be paid by the party, plaintiff or defendant, by whom the execution or attachment was sued out.

917. In case after the seizure of any property under attachment, or in execution, an issue is directed, and the property seized remains, pending the trial of the issue, in the custody of

the sheriff or other officer who seized the same, the Court from which the writ or order of attachment or writ of execution issued, or any Judge thereof, may make an order for payment to the sheriff or other officer of such sum for his trouble in and about the custody of the property as the Court or Judge deems reasonable, and the sheriff or other officer shall have a lien upon the property for payment of the same in the event of the issue being decided against the claimant, but only to the extent to which such issue shall be so decided.

918. When an issue is directed upon any interpleader application the order for the same shall set out in detail the names of the parties to such issue, the matter to be tried, and the description of the goods, money, or property in question. Such order shall be settled by the Judge. When the order is made a copy thereof shall be filed, with the affidavits and other papers filed upon the interpleader application. Such copy of the order and all affidavits and papers relating thereto shall be forthwith transmitted to the office of the Court where the trial is to take place. No formal issue is to be drawn up or used, but the said copy of the order for issue shall be used instead thereof, and shall be the record for use at the trial. So soon as the order for trial of an issue is made all parties thereto shall be liable to examination in the manner heretofore provided as to the examination of parties. No other record shall be entered than as above provided, but the clerk shall on præcipe filed by either party set down the issue for trial at the proper sittings.

919. The affidavit of the sheriff or other officer applying for an interpleader order shall set out a list of the goods and chattels seized, with the value placed upon them by said sheriff or other officer, unless where the total value of goods and chattels seized amounts to the sum of four hundred dollars or more, in which case such list shall be unnecessary, and only the fact of such value shall be stated.

920. When goods or chattels are seized under a writ of execution or a writ or order for attachment issued out of the Court of Queen's Bench and an interpleader order is made, in case the value of the said goods and chattels does not, in the opinion of the Judge or other person making such order, exceed the sum of four hundred dollars, the order directing an issue to be tried shall direct that the issue shall be tried in the County Court of the Judicial Division in which such goods and chattels, or some part thereof, were seized, or in such other County Court as the Judge or other person making such order may direct, and in such case the issue shall be tried in such County Court.

921. After the order for such issue shall have been settled and drawn up under the last preceding rule, up to which point the proceedings shall be carried on in the Court of Queen's Bench, a copy of the same shall be filed with the Clerk of the County Court, and thereupon such issue shall become a cause in said County Court, and all the provisions of "The County Courts Act" as to the trial of causes therein and appeals therefrom, or any provisions which may at any time be substituted therefor shall apply to said issue.

922. After such issue shall have been tried and determined in a County Court, the costs shall be taxed by the clerk of such

County Court according to the provisions of "The County Courts Act." The Judge of said County Court shall after reviewing, and, if necessary, correcting such taxation, indorse upon the copy of the order for said issue, filed as above provided, the judgment of said County Court upon said issue, and shall also certify upon said copy the amount of costs so taxed. The clerk of the County Court after the time for appealing has expired, or sooner if the Judge of such County Court shall so order, shall deliver to the successful party the copy of the order for such issue so indorsed, who shall file the same in the Court of Queen's Bench. The provisions of Rule 910 shall not apply to issues tried under this and the last two preceding rules in a County Court. All subsequent proceedings in connection with the order for such issue shall be carried on in the Court of Queen's Bench.

923. Any common carrier or other bailee of goods and chattels whether under a special contract or otherwise howsoever, upon whom any claim is made to any goods or chattels in the possession of such carrier or bailee by any one or more claimants, whether such claims have or have not a common origin, may either before or at any time after action is brought by any such claimants respecting the said goods, upon affidavit showing how the said goods and chattels came into his possession, the nature and extent of any lien which the said carrier or bailee has upon the said goods and chattels for services rendered and money advanced thereon, if any such claim exists, and the value or supposed value thereof, also showing who said claimants respectively are, and the nature (as far as said carrier or bailee knows) of the claims respectively made to said goods, and that he, the said carrier or bailee, has good reason to believe, and does believe, that if he delivers such goods to either of the claimants he will be sued by the other or others of them, and that he does not collude with any or either of the parties claiming possession of said goods and chattels, apply to any Judge of the Court, or where the value of the goods does not exceed four hundred dollars to any Judge of a County Court of the judicial division within which such goods are at the time of the application, by motion calling upon all the parties respectively claiming the said goods and chattels to appear and state the nature and particulars of their respective claims and to maintain or relinquish the same.

(2) The Judge or County Court Judge in disposing of said application shall have and exercise all the powers given to a Judge in interpleader matters.

924. In case any such claimant being duly served with notice of the said motion does not appear to maintain or relinquish his claim or right, or refuses to comply with any order made after appearance, the said Judge may declare him barred from making or prosecuting his claim against the said carrier or bailee, saving the right or claim of such party against the person or party to whom, under the said order, said goods, or the proceeds thereof may be delivered, and the said Judge may make such order between the parties to the said application as may be just.

925. It shall not be necessary, in order to entitle any such carrier or bailee to relief by way of interpleader that he should

abandon any lawful lien he may have upon the goods and chattels which are the subject of such application, and in disposing of said application, the Judge, in the case of any such lien, may make such order respecting the satisfaction or payment thereof, and as to the relief asked and sought thereby, and as to the costs of the parties and the payment thereof, as the right and justice of the case may require.

970. The Court or a Judge may, in or for the purposes of any interpleader proceeding, make all such orders as to costs and all other matters as may be just and reasonable.

33. Every local Judge shall have all the powers of the Referee in Chambers in respect to all interpleader applications and all matters incidental thereto, and the disposal of the same when such application is made by or on behalf of the sheriff of the judicial district for which such County Court Judge is the local Judge, whether the action in respect of which the application is made was commenced in the judicial district of such Judge or not. An interpleader application by or at the instance of a sheriff may in every case be made to the local Judge for the judicial district which, or part of which, constitute such sheriff's bailiwick, and such local Judge shall have the aforesaid powers in reference thereto.

202. When an issue is directed to be tried the order therefor shall be filed forthwith after it is issued, in the judicial district in which it is directed to be tried, and thereafter the proceedings in the issue shall be carried on in the said judicial district in the same manner as the proceedings in an action commenced in such judicial district. But the Court or a Judge may order otherwise, and may change the place of trial in the same manner and subject to the same rules as in an action.

In the inferior Courts provision is made for interpleader by bailiffs and other officers, Revised Statutes, 1891, c. 33, ss. 270-274, The County Courts Act.

Maryland.—In this State bills of interpleader are resorted to, and the equitable principles of interpleader are followed: *Union Bank v. Kerr* (1849), 2 Md. Ch. 460; *Kerr v. Union Bank* (1862), 18 Md. 398; *Owings v. Rhodes* (1886), 65 Md. 408. There is no statutory provision other than the following.

Where, in a bill of interpleader, some of the defendants are non-residents, and such non-residents fail to answer, the Court may order the answers filed by the other defendants to be taken as the answers of such non-resident defendants, or may as to such defendants direct testimony to be taken; provided, notice of the substance and objects of the bill and answers be given, as in other cases of non-residents. This section to apply to one or more defendants. Code Art. 16, section 110.

Massachusetts.—Bills of interpleader are employed and the equitable principles followed: *Salisbury v. Townsend* (1871), 109 Mass. 115; *Boston v. Skillings* (1882), 132 Mass. 410; *National v. Pingrey* (1886), 141 Mass. 411. In 1886 a statutory provision was adopted, chapter 281.

In all actions in which a liability is admitted by the defendant and the amount of such liability is not in dispute, if it appears that such amount is claimed by another party than the plaintiff, whether by the husband or wife of said plaintiff

or otherwise, and that the defendant has no interest in the subject matter of the controversy, the Court in which such action is pending on the petition of the defendant, which petition shall give the name and residence of all known claimants and the amount actually due from the defendant, and on such notice as the Court may order to the plaintiff and to such claimants, may order the proceedings to be amended by making such claimants parties defendant thereto, and thereupon the rights and interests of the several parties in and to said amount shall be heard and determined. Such amount may remain in the hands of the defendant until final judgment, and shall then be paid in accordance with the order of the Court, or may be paid into Court to await final judgment, and when so paid into Court the defendant shall be stricken out as a party to the action and his liability for said amount shall cease. The taxable costs of the defendant in such actions shall be in the discretion of the Court and may be charged upon the fund.

Acts 1899, c. 352. In any action in which recovery of, or the determination of the title to, property held by a public warehouseman or other depositary is sought, if it appears that such property is claimed by another party than the plaintiff, whether by the husband or wife of said plaintiff or otherwise, the Court in which such action is pending, on the petition of the defendant, which petition shall give the name and residence of all known claimants, and on such notice as the Court may order to the plaintiff and to such claimants may order the proceedings to be amended by making such claimants defendants therein; and thereupon the rights and interests of the several parties in and to such property shall be heard and determined. Such property may remain in the hands of the public warehouseman or other depositary until final judgment, and shall then be delivered in accordance with the order of the Court.

Michigan.—There is no statutory enactment on the subject of interpleader, but bills of interpleader in equity are made use of: *School District v. Weston* (1875), 31 Mich. 86; *Michigan v. White* (1880), 44 Mich. 25.

Minnesota.—In this State the equitable principles of interpleader are followed: *Cullen v. Dawson* (1877), 24 Minn. 66. While the Code provision is as follows:

Section 5273. A defendant against whom an action is pending upon contract or for money, or specific, real or personal property, may at any time before answer, upon affidavit that a person not a party to the action, and without collusion with him, makes a demand against him for the same money debt or property, upon due notice to such person and the adverse party, apply to the Court for an order to substitute such person in his place, and discharge the defendant from liability to either party on his depositing in Court the amount of the debt or money, or delivering the property or its value to such person as the Court may direct, and the Court may thereupon make the order and thereafter the action shall proceed between the plaintiff and person so substituted, and the Court may compel them to interplead. For remarks as to practice, see *Hooper v. Balch* (1883), 31 Minn. 276.

Mississippi.—The equitable principles of interpleader are followed upon bills of interpleader: *Yardborough v. Thompson* (1844), 3 Smed. & M. 291; *Sno-grass v. Butler* (1876), 54 Miss. 45; *Whitney v. Cowan* (1878), 55 Miss. 626. The Code of 1892 has the following provisions:

714. Upon affidavit of a defendant before plea filed in any action upon contract, or for the recovery of personal property, that a third party, a resident of this State, without collusion with him, has a claim to the subject of the action, and that he is ready to pay or dispose of the same as the Court may direct, the Court may make an order for the safe keeping or payment, or deposit in Court, or delivery of the subject matter of the action to such person as it may direct, and an order requiring such third party to be summoned to appear in a reasonable time and maintain or relinquish his claim against the defendant. If such third party, being summoned, shall fail to appear, the Court may declare him barred of all claim in respect to the subject of the action against the defendant therein; but if such third party appear he shall be allowed to make himself defendant in the action at law instead of the original defendant, who shall be discharged from all liability to either of the other parties, in respect to the subject of the action, upon his compliance with the order of the Court for the payment, deposit, or delivery thereof. If the claim of such third party extend to only a part of the subject matter of the action, similar proceedings may be had respecting the part so claimed, and the action shall proceed as to the residue as in other cases.

715. The provisions of the last section shall be applicable to any action brought against a sheriff or other officer for the recovery of personal property taken by him under execution or attachment, or for the proceeds of property so taken and sold by him; and the defendant in any such action shall have the benefit of said provisions against the party in whose favour the execution or attachment issued, by making affidavit that the property, for the recovery of which or its proceeds the action was brought, was taken under process, describing it; and in such case the judgment of the Court shall be framed to effect justice between the parties according to their rights.

716. If the plaintiff in such execution or attachment be a non-resident of the State, the summons may be served on his attorney, and shall have the same effect as if served personally on the party, or he may be made a party by publication.

2148. When a garnishee by his answer or by affidavit at any time before final judgment against him, or after such judgment if he had no such notice before the judgment was rendered, shall show that he has been notified that another person claims title to or an interest in the debt or property, which has been admitted by him or found on a trial to be due or to be in his possession, the Court shall suspend all further proceedings, and cause a summons to issue or publication to be made for the person so claiming to appear and contest with the plaintiff the right to such money, debt, or property. In such case if the answer admit an indebtedness, and the garnishee pay the money into Court, he shall thereupon be discharged from liability to either party for the sum so paid.

2144. If the claimant being duly summoned, fail to appear, the Court shall adjudge the money, debt or property to the plaintiff. If he appear he shall propound his claim to the money, debt or property in writing under oath; and the plaintiff may take issue thereon, and the same shall be tried and determined as other issues; and if the issue be found in favour of the plaintiff, judgment shall be rendered for him against the garnishee, and also for the costs of the interpleader against the claimant; but if the issue be found for the claimant, judgment shall be rendered in his favour against the garnishee, and against the plaintiff for the costs. When the garnishee has paid money into Court, the judgment shall direct its payment to the party entitled thereto, and a judgment therefor shall not go against the garnishee.

For remarks on the Code, see *Moore v. Ernst* (1877), 54 Miss. 642; *Horton v. Grant* (1879), 58 Miss. 406; *Hittingham v. Handy* (1882), 60 Miss. 334; *Kellog v. Freeman* (1874), 50 Miss. 127; *Morin v. Bailey* (1878), 55 Miss. 570; *Dodds v. Gregory* (1883), 61 Miss. 351; *Porter v. West* (1886), 64 Miss. 548.

Missouri.—In this State the equitable principles of interpleader applicatioe to bills of interpleader are followed: *Kring v. Green* (1846), 10 Mo. 195; *Hathaway v. Foy* (1867), 40 Mo. 540; *Monke v. Miller* (1883), 13 Mo. App. 363; *Boyer v. Hamilton* (1886), 21 Mo. App. 520. There is no statutory interpleader, although the term interplead is used in connection with the practice of intervention. See section 417, Code of 1892.

Montana.—In this State bills of interpleader are resorted to: *Perkins v. Guy* (1873), 2 Mont. 15. There is also the following section in the Code of Civil Procedure (1895).

Section 588. A defendant against whom an action is pending upon a contract, or for specific personal property, may at any time before answer upon affidavit that a person not a party to the action makes against him, and without any collusion with him, a demand upon such contract or for such property, upon notice to such person and the adverse party, apply to the Court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in Court the amount claimed on the contract or delivering the property or its value to such person as the Court may direct, and the Court may in its discretion make the order. And whenever conflicting claims are or may be made upon a person for or relating to personal property, or the performance of an obligation, or any portion thereof, such person may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims among themselves. The order of substitution may be made and the action of interpleader may be maintained, and the applicant or plaintiff be discharged from liability to all or any of the conflicting claimants, although their titles or claims have not a common origin, or are not identical, but are adverse to and independent of one another.

Nebraska.—The following are the provisions relating to interpleader in the Code of Civil Procedure, 1895:

Section 48. Upon the affidavit of a defendant before answer in any action upon contract, or for the recovery of personal property, that some third party without collusion with him, has or

makes a claim to the subject of the action, and that he is ready to pay or dispose of the same as the Court may direct, the Court may make an order for the safekeeping, or for the payment or deposit in Court or delivery of the subject of the action to such person as it may direct, and an order requiring such third party to appear in a reasonable time and maintain or relinquish his claim against the defendant. If such third party, being served with a copy of the order by the sheriff, or such other person as the Court may direct, fail to appear, the Court may declare him barred of all claim in respect to the subject of the action against the defendant therein. If such third party appear, he shall be allowed to make himself defendant in the action, in lieu of the original defendant, who shall be discharged from all liability to either of the other parties in respect to the subject of the action, upon his compliance with the order of the Court for the payment, deposit or delivery thereof.

Section 49. The provisions of the last section shall be applicable to an action brought against a *sheriff* or other officer for the recovery of personal property taken by him under execution, or for the proceeds of such property so taken and sold by him. And the defendant in such action shall be entitled to the benefit of those provisions against the party in whose favour the execution issued, upon exhibiting to the Court the process under which he acted, with his affidavit that the property, for the recovery of which or its proceeds, the action is brought, was taken under such process.

Section 50. In an action against a sheriff, or other officer, for the recovery of property taken under an execution, and replevied by the plaintiff in such action, the Court may upon application of the defendant, and of the party in whose favour the execution issued, permit the latter to be substituted as the defendant, security for the costs being given.

See *Hartford Life Annuity Ins. Co. v. Cummings* (1897), 50 Neb. 236.

Nevada.—In this State bills of interpleader are made use of: *Orr v. Larcombe* (1879), 14 Nev. 53. The statutory provision is headed "When substitution may be made."

Section 3693 (Section 598). A defendant against whom an action is pending upon a contract, or for specific personal property, may at any time before answer, upon affidavit that a person not a party to the action makes against him, and without any collusion with him, a demand upon the same contract, or for the same property, upon due notice to such person, and the adverse party, apply to the Court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in Court, the amount claimed on the contract, or delivering the property or its value to such person as the Court may direct, and the Court may in its discretion make the order.

New Brunswick.—Statutes 1897, chapter 24, "The Supreme Court Act."

Section 222. Upon an application of a defendant in any action made after declaration and before plea, by affidavit or otherwise, showing that he does not claim any interest in the subject matter of the suit, or that the same is claimed or

supposed to belong to some third party, and that he does not in any manner collude with such third party, a Judge may order such third party to appear and state the nature and particulars of, and maintain or relinquish his claim, and upon such order may hear the allegations as well of such third party as of the plaintiff, and in the meantime may stay the proceedings in such action, and may order such third party to make himself defendant in the same or some other action, or proceed to trial on a feigned issue, and also direct which of the parties shall be plaintiff or defendant on such trial, or with the consent of the plaintiff and such third party, may dispose of the merits of their claims and determine the same in a summary manner, and make such other order therein as to costs and all other matters as may appear just.

Section 223. The decision of a Judge in a summary manner shall be conclusive against the parties, and all parties claiming under them.

Section 224. If such third party shall not appear on service of the order to maintain or relinquish his claim, or shall neglect to comply with any order made after appearance, the Judge may declare him and all persons claiming under him to be forever barred from prosecuting his claim against the original defendant, his executors or administrators, saving the right of such third party against the plaintiff, and thereupon may make such order between such defendant and the plaintiff, as to costs and other matters, as may appear just.

Section 225. Any such order may be rescinded or altered by the Court, and in any stage of the proceedings the Judge may refer the matter to the Court who shall hear and dispose of the same.

Section 226. In case any claim be made by a person, not being the defendant, to any property seized by a sheriff under execution, a Judge upon application of the sheriff made before or after the return of the process, and before or within a reasonable time after action brought against such sheriff may make such order for his relief as shall be just according to the circumstances of the case; the costs shall be in the discretion of the Judge.

Section 227. All such orders and decisions may, together with the declaration in the cause (if any), be entered of record, and shall have the force and effect of a judgment. If the costs payable under any such order or decision be not paid within fifteen days after taxation and demand thereof, execution may issue therefor.

Section 228. So far as applicable the several provisions of this Act shall apply to the foregoing provisions relating to "Interpleading."

Newfoundland has adopted the English interpleader code as it stood in 1883, and the provisions are found in section 13 (12) of the Judicature Act, 1889, now chapter 50 of the Revised Statutes of 1892, and in the fifteen rules of Order XLV. of the same Act.

New Hampshire.—In this State the equitable principles of interpleader are followed: *Farley v. Blood* (1854), 30 N. H. 354;

Parker v. Barker (1800), 43 N. H. 78. There is no statute relating to interpleader.

New Jersey.—In this State bills of interpleader are employed, and the equitable principles of interpleader are followed: *Westervelt v. Ackerman* (1835), 2 Green, 325; *Blair v. Porter* (1861), 13 N. J. Eq. 267; *Mount Holly v. Ferree* (1864), 17 N. J. Eq. 117; *Loddel v. Starr* (1869), 20 N. J. Eq. 274; *McWhirter v. Hainted* (1885), 24 Fed. Rep. 328. No statutory provision is in force, other than the following:

That in all cases in which the Court of Chancery shall decree an interpleader as between the defendants to a bill of interpleader, the said Court shall award to the complainant a counsel fee commensurate with the service of his counsel in the cause, to be taxed in the bill of costs and collected therewith. Genl. Pub. Laws, 1893, chapter 126.

New Mexico has no interpleader statute, and being a jurisdiction which retains the Common Law as the rule of practice does not know the equitable remedy by bill of interpleader.

New South Wales.—In this colony the English Interpleader Act of 1 & 2 William IV., c. 58, is in force, and relief under it is administered by Courts of law. 5 William IV., N. S. W., No. 8. The English amendments of 1800 have not been adopted: *Lazarus v. Harris* (1838), 9 N. S. Wales L. R. 148. There is also an interpleader provision applying to The Small Debts Court, 10 Vict. (N. S. W.) No. 10, s. 24.

New York.—The English principles of interpleader in equity were early adopted: *Richards v. Salter* (1822), 6 John Ch. 445; *Atkinson v. Manks* (1823), 1 Cow. 691; *Badeau v. Rogers* (1830), 2 Pal. 209; *Bedell v. Hoffman* (1830), 2 Pal. 199; *Shaw v. Chester* (1834), 2 Ed. Ch. 405; *Shaw v. Ooster* (1840), 8 Paige 339. These fundamental principles have ever since been consistently followed: *Beck v. Stephant* (1854), 9 How. 193; *Crane v. Macdonald* (1890), 118 N. Y. 648. In 1851 the Legislature enacted a provision, under which a defendant might in certain cases obtain relief by interpleader.

Section 122. A defendant against whom an action is pending upon a contract, or for specific, real or personal property, may at any time before answer upon affidavit that a person not a party to the action and without collusion with him, makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, apply to the Court for an order to substitute such person in his place, and discharge him from liability to either party on his depositing in Court the amount of the debt, or delivering the property or its value to such person as the Court may direct, and the Court may in its discretion make the order.

This was suggested by the English statute of 1 & 2 Wm. IV. (1831), c. 58. It was amended in 1877, by dropping the right to give relief in respect of real property, and by allowing interpleader to a defendant in an action of ejectment; and again in 1894, and now stands in the current Code of civil procedure as follows (see chapter 246, laws, 1894).

Section 820. A defendant against whom an action to recover upon a contract, or an action of ejectment, or an action to

recover a chattel is pending, may at any time before answer, upon proof by affidavit, that a person not a party to the action, makes a demand against him for the same debt or property, without collusion with him, apply to the Court upon notice to that person and the adverse party, for an order to substitute that person in his place, and to discharge him from liability to either, on his paying into Court the amount of the debt, or delivering the possession of the property, or its value, to such person as the Court directs; or upon it appearing that the defendant disputes, in whole or in part, the liability as asserted against him by different claimants, or that he has some interest in the subject matter of the controversy which he desires to assert, his application may be for an order joining the other claimant or claimants as co-defendants with him in the action. The Court may, in its discretion, make such order, upon such terms as to costs and payments into Court of the amount of the debt, or part thereof, or delivering of the possession of the property or its value or part thereof, as may be just, and thereupon the entire controversy may be determined in the action.

Interpleader will not lie in an action removed from a Justice's to a County Court: *Rundle v. Gordon* (1896), 27 App. Div. N. Y. 452.

New Zealand.—By Act No. 39 of 1882, 46 Vict., this colony adopted what is in substance the English Judicature Act and Rules of 1882, so far as they apply to stakeholders. Rules 472 to 479 of The Code of Civil Procedure in the Supreme Court of New Zealand, are in substance, the rules relating to interpleader contained in the English Order LVII. of 1882.

North Carolina.—In this State the Courts follow the equitable principles of interpleader: *Martin v. Maberry* (1828), 1 Dev. 169; *Quinn v. Green* (1840), 1 Ired. Eq. 229; see also *Dewey v. White* (1871), 65 N. Car. 225, and *Munds v. Cassidy* (1887), 98 N. Ca. 558. The following section is contained in the Code of Civil Procedure.

Section 189. A defendant against whom an action is pending upon a contract, or for specific, real or personal property, upon proof by affidavit that a person not a party to the action makes a demand against him for the same debt or property, without collusion with him, may at any time before answer, apply to the Court, upon notice to that person and the adverse party, for an order to substitute that person in his place, and to discharge him from liability to either on his paying into Court the amount of the debt, or delivering the possession of the property or its value to such person as the Court shall direct. The Court in its discretion may make such an order.

North Dakota has the following provision under which a defendant in an action may interplead. Code of Civil Procedure, 1895, section 5240.

A defendant against whom an action is pending upon a contract, or for specific, real or personal property, may at any time before answer, upon affidavit that a person not a party to the action, and without collusion with him, makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, apply to the Court for an order to substitute such person in his place, and discharge him from

liability to either party, on his depositing in Court the amount of the debt, or delivering the property or its value to such person as the Court may direct, and the Court may in its discretion make the order.

North-West Territories (Canada).—The Judicature Ordinance, chapter 21 of Consolidated Ordinances, 1898.

Section 19 (5). In case of an assignment of a debt or other chose in action, if the debtor, trustee or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor, or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled if he think fit to call upon the several persons making claim thereto to interplead concerning the same.

Rule 431. Relief by way of interpleader may be granted:—

(1) Where the person seeking relief (hereinafter called the applicant) is under any liability for any debt, money, goods or chattels, for or in respect of which he is or expects to be sued by two or more parties (hereinafter called the claimants) making adverse claims thereto. (2) Where the applicant is a sheriff or other officer charged with the execution of process by or under the authority of the Court, and claim is made to any property taken or intended to be taken in execution or attachment under any process, or to the proceeds or value of any such property by (a) Any person other than the person against whom the process issued; (b) Any landlord for rent; (c) Any second or subsequent execution creditor claiming priority over any previous judgment, execution, process or proceeding; (d) The execution or attachment debtor claiming the benefit of any exemptions from seizure allowed by law.

432. Where a claim is made to or in respect of any goods or chattels taken in execution under the process of the Court, it shall be in writing and upon the receipt of the claim the sheriff or his officer shall forthwith give notice thereof to the execution creditor, and the execution creditor shall within four days after receiving the notice give notice to the sheriff or his officer that he admits or disputes the claim. If the execution creditor admits the title of the claimant and gives such notice he shall only be liable to such sheriff or officer for any fees and expenses incurred prior to the receipt of the notice admitting the claim.

433. Where the execution creditor does not in due time as directed by the last preceding rule, admit or dispute the title of the claimant to the goods or chattels, and the claimant does not withdraw his claim thereto by notice in writing to the sheriff or his officer, the sheriff may apply for an interpleader summons to be issued, and should the claimant withdraw his claim by notice in writing to the sheriff or his officer, or the execution creditor in like manner serve an admission of the title of the claimant prior to the return day of such summons, and at the same time give notice of such admission to the claimant, the Judge may in and for the purposes of the interpleader proceedings, make all such orders as to costs fees, charges and expenses as may be just and reasonable.

434. The applicant must satisfy the Court or Judge by affidavit or otherwise: (1) That the applicant claims no interest

in the subject-matter in dispute, other than for charges or costs; and (2) That the applicant does not collude with any of the claimants; and (3) That the applicant is willing to pay or transfer the subject matter into Court or to dispose of it as the Court or Judge may direct.

435. The applicant shall not be disentitled to relief by reason only that the titles of the claimants have not a common origin but are adverse to and independent of one another.

436. When the applicant is a defendant application for relief may be made any time after service of the writ of summons.

437. The applicant may take out a summons calling on the claimants to appear and state the nature and particulars of their claims, and either to maintain or relinquish them.

438. If the application is made by the defendant in an action the Court or Judge may stay all further proceedings in the action.

439. If the claimants appear in pursuance of the summons the Court or a Judge may order either that any claimant be made a defendant in any action already commenced in respect to the subject matter in dispute in lieu of or in addition to the applicant, or that an issue between the claimants be stated and tried, and in the latter case may direct which of the claimants is to be plaintiff and which defendant, as also the time and place for the trial of such issue.

440. The Judge may if it seems desirable so to do, dispose of the merits of their claims, and decide the same in a summary manner and on such terms as may be just.

441. When the question is a question of law, and the facts are not in dispute, the Judge may either decide the question without directing the trial of an issue, or order that a special case be stated for the opinion of the Court. If a special case is stated, the provisions herein relating to special cases shall as far as applicable, apply thereto.

442. If a claimant having been duly served with a summons calling upon him to appear and maintain or relinquish his claim, does not appear in pursuance of the summons, or having appeared neglects or refuses to comply with any order made after his appearance, the Court or Judge may make an order declaring him, and all persons claiming under him, for ever barred against the applicant, and persons claiming under him, but the order shall not affect the rights of the claimants as between themselves.

443. Subject to the provisions of this order an appeal shall lie to the Court in banc, from the decision of the Court or a Judge in any interpleader proceeding, but subject to such appeal the decision of the Court or Judge shall be final and conclusive against the claimants and all persons claiming under them.

444. When goods and chattels have been seized in execution or under attachment, by a sheriff, and any claimant alleges that he is entitled under a bill of sale, or otherwise to the same by way of security for debt, the Judge may order the sale of the whole or a part thereof, and direct the application of the proceeds of the sale in such manner and upon such terms as may be just.

445. The rules of Court in respect to discovery and inspection shall, with the necessary modifications, apply in inter-

pleader proceedings, and the Judge before whom the proceedings are had may finally dispose of the whole matter of the interpleader proceedings including all costs not otherwise provided for.

446. In case the sheriff has more than one writ, at the suit or instance of different parties, against the same property, it shall not be necessary for the sheriff to make separate applications on such writs or in each case, but he may make one application, and make all the parties, who are execution creditors parties to the said application; and the Court or Judge before whom the application is made may make such order therein, as if a separate application had been made upon and in respect of each writ.

447. Pending the adjudication of any such claim, the sheriff may, upon sufficient security being given to him by bond or otherwise for the forthcoming and delivery to him of the property so taken, or the value thereof, when demanded, permit the claimant to retain possession of the same until there shall be final adjudication in respect of the same; but in very such case it shall be competent for the said sheriff or other officer, at any time he shall see fit, to resume the actual and absolute possession and custody of the said property, notwithstanding such bond or security. Horses, cattle, sheep, or any perishable goods, the subject of interpleader, may at the request of either party, and upon his furnishing sufficient security, or by order of the Judge, be sold by the seizing officer at public auction to the highest bidder, giving not less than ten days notice of such sale unless any of the articles are of such a nature as not to admit of delay, in which case they may be sold forthwith.

448. The Court or a Judge may in and for the purposes of any interpleader proceedings, make all such orders as to costs and all other matters as may be just and reasonable.

Nova Scotia.—Interpleader is governed by Order LVI. of the Rules of the Supreme Court, 1900, which is almost a verbatim copy of the corresponding Rules in Order LVII. of the present English Rules; and by section 19 (6) of the Nova Scotia Judicature Act Revised Statutes, 1900, c. 155, which is the same as the Ontario section, R. S. O. (1897), c. 51, s. 58 (6). As to the introduction of interpleader in this Province, see *Cooper v. Mylne* (1876), 11 Nova Scotia, 382.

Ohio.—The principles of interpleader in equity have been followed from an early date: *Goddard v. Leach* (1833), 1 Wright 476. The Revised Statutes, 1890, contain the following provisions:

Section 5016. Upon affidavit of a defendant before answer, in an action upon contract, or for the recovery of personal property, that a third party without collusion with him, has or makes a claim to the subject of the action, and that he is ready to pay or dispose of the same as the Court may direct, the Court may make an order for the safe keeping, or for the payment or deposit in Court of the subject of the action, or the delivery thereof to such person as it may direct, and also an order requiring such third party to appear in a reasonable time, and maintain or relinquish his claim against the defendant, and if such third party having been served with a copy of the order, by the sheriff, or such other person as the Court may direct,

fail to appear, the Court may declare him barred of all claim in respect to the subject of the action against the defendant therein; but if he appear he shall be allowed to make himself defendant in the action in lieu of the original defendant, who shall be discharged from all liability to either of the other parties in respect to the subject of the action upon his compliance with the order of the Court for the payment, deposit or delivery thereof.

Section 5017. An officer against whom an action is brought to recover personal property taken by him on execution, or for the proceeds of such property sold by him, may upon exhibiting to the Court the process under which he acted, with his affidavit that the property was taken or sold by him under such process, have the benefit of the provisions of the preceding section, against the party in whose favour the execution issued.

Section 5018. In an action against an officer for the recovery of property taken under an execution or attachment, the Court may upon application of the defendant, or of the party in whose favour the execution or attachment issued, permit the latter to be substituted as the defendant in such action, security for costs having been given, or the Court may order such substitution to be made on application of the officer.

For remarks on the practice under this Code, see *Sifford v. Beatty* (1861), 12 Ohio St. 189; *Leslie v. Eastman* (1867), 17 Ohio St. 158; *Morgan v. Spangler* (1870), 20 Ohio St. 38; and as to interpleader in Justices' Courts, *Geller v. Puchta* (1885), 1 Ohio Circuit Cts. 20.

Oklahoma.—The Statutes of Oklahoma, 1893, contain the following sections relating to interpleader:—

Section 3915. Upon affidavit of a defendant before answer in any action upon contract, or for the recovery of personal property, that some third party without collusion with him, has or makes a claim to the subject of the action, and that he is ready to pay or dispose of the same as the Court may direct, the Court may make an order for the safe keeping or for the payment or deposit in Court, or delivery of the subject of the action, to such persons as it may direct, and an order requiring such third party to appear in a reasonable time and maintain or relinquish his claim against the defendant. If such third party, being served with a copy of the order by the sheriff or such other person as the Court may direct, the Court may declare him barred of all claim in respect to the subject of the action against the defendant therein. If such third party appear he shall be allowed to make himself defendant in the action in lieu of the original defendant, who shall be discharged from all liability to either of the other parties in respect to the subject of the action upon his compliance with the order of the Court for the payment, deposit or delivery thereof.

Section 3916. The provisions of the last section shall be applicable to an action brought against a sheriff or other officer for the recovery of personal property taken by him under execution, or for the proceeds of such property so taken and sold by him, and the defendant in any such action shall be entitled to the benefit of those provisions against the party in whose favour the execution issued, upon exhibiting to the Court the

process under which he acted, with his affidavit that the property for the recovery of which or its proceeds the action is brought, was taken under such process.

Section 3917. In an action against a sheriff or other officer, for the recovery of property taken under an execution and replevied by the plaintiff in such action, the Court may upon application of the defendant and of the party in whose favour the execution issued, permit the latter to be substituted as defendant security for the costs being given.

Section 3919. In all cases of interpleader costs may be adjudged for or against either party as in ordinary cases.

See *Goodrich v. Williamson* (1899), 63 P. 974.

Ontario.—The enactments in Ontario are founded mainly on the English provisions. The English Act of 1831 was adopted in Upper Canada in 1843, 7 Vict., chapter 30. The present law is found in some scattered statutory sections and the following rules of The Rules of Practice and Procedure of the Supreme Court, revised and consolidated in 1897:—

1102. In Rules 1103 to 1128, (a) "Execution," "writ" and "writ of execution," shall include an "order of attachment under The Absconding Debtor's Act, and rules 1058 to 1066." (b) "Execution creditor" shall include "attaching creditor." (c) "Sheriff" shall mean, a sheriff, coroner, elisor, or other officer charged with the execution of any writ or process of the High Court, or of a County Court in cases where Rule 1123 applies.

1103. Relief by way of interpleader may be granted: (a) Where the person seeking relief (hereinafter called the applicant is under liability for any debt, money, goods or chattels, for or in respect of which he is, or expects to be sued by two or more persons (hereinafter called the claimants) make adverse claims thereto; (b) Where the applicant is a sheriff and claim is made to any money, goods or chattels, lands or tenements, taken or intended to be taken in execution under a writ of execution, or to the proceeds or value thereof, by any person other than the person against whom the process issued.

1104. The applicant shall satisfy the Court or a Judge by affidavit or otherwise: (a) That he claims no interest in the subject matter in dispute, other than in respect of a lien or for charges or costs; (b) That he does not collude with any of the claimants; and (c) That he is willing to pay or transfer the subject matter into Court, or to dispose of it as the Court or a Judge may direct.

1105. The applicant shall not be disentitled to relief by reason only that the titles of the claimants have not a common origin but are adverse to and independent of one another.

1106. Where the applicant is a defendant, application for relief may be made at any time after service of the writ of summons, and the Court or a Judge may stay all proceedings in the action.

1107. The applicant may make a motion calling on the claimants to appear and state the nature and particulars of their claims, and either to maintain or relinquish them.

1108. Where a claimant does not appear on the motion after having been served with a notice of motion calling on him to

appear and maintain or relinquish his claim, or, having appeared neglects or refuses to comply with any order made thereafter, the Court or a Judge may make an order declaring him and all persons claiming under him to be forever barred as against the applicant and all persons claiming under him, but the order shall not affect the rights of the claimants as between themselves.

1109. Where the claimants appear on the motion, the Court or a Judge may order that any claimant be made a defendant in any action already commenced in respect of the subject matter in dispute in lieu of or in addition to the applicant, or that an issue between the claimants be stated and tried, and in the latter case may direct which of the claimants shall be plaintiff and which defendant.

1110. The Court or a Judge may with the consent of both claimants or on the request of any claimant, if having regard to the value of the subject matter in dispute, it seems desirable so to do, dispose of the merits of their claims, and subject to appeal, decide the same in a summary manner and on such terms as may seem just.

1111. Where the question is one of law, and the facts are not in dispute, the Court or a Judge may decide the question without directing the trial of an issue, or order that a special case be stated for the opinion of the Court.

1112. Where goods or chattels have been seized in execution by a sheriff, and any claimant alleges that he is entitled under a bill of sale or otherwise to the goods or chattels by way of security for debt, the Court or a Judge may order a sale of the whole or a part thereof, and direct the application of the proceeds of the sale in such manner and upon such terms as may seem just.

1113. Where a sheriff applies for relief by interpleader and any execution creditor declines to join in contesting the claim of the adverse claimant, the Court or Judge may direct that such creditor shall be excluded from any benefit which may be derived from the contestation of the claim.

1114. The Court or Judge who tries the issue may finally dispose of the Interpleader proceedings including all costs not otherwise provided for.

1115. When a sheriff finds property in the possession of a debtor against whose property he has a writ or other process in his hands, and a claim is set up to such property by or on behalf of a third person who is out of possession, or is in joint possession with the debtor, the claim of such third person shall be made in writing, and upon receipt thereof the sheriff shall forthwith give notice thereof to the execution creditor according to Form No. 72, and the execution creditor shall within seven days thereafter, give notice to the sheriff according to Form No. 73, that he admits or disputes the claim. If the execution creditor admits the title of the claimant and gives notice as directed by this rule, he shall only be liable to such sheriff for fees and expenses incurred before the receipt of the notice admitting the claim, and no action shall be brought against the sheriff in respect of the seizure of the property.

1116. Where the execution creditor does not in due time as directed by rule 1115 admit or dispute the title of the claimant

to the property, and the claimant does not withdraw his claim thereto by notice in writing to the sheriff, the sheriff may apply for relief by interpleader; and if the claimant withdraws his claim by notice in writing to the sheriff or the execution creditor serves an admission of the title of the claimant after the return day of such notice of motion, and at the same time gives notice of such admission to the claimant, the Court or Judge may make all such orders as to costs, fees, charges and expenses, as may seem just.

1117. Where it is necessary or expedient to make one order in several actions or matters, the order may be made and shall be entitled in all such actions or matters, and (subject to the right of appeal) shall be binding on all the parties.

1118. In case a sheriff has more than one writ of execution against the same property, he shall not make a separate application on each writ or in each action; but he may make one application and may make all the execution creditors parties.

1119. Where there are writs from several Courts, including the High Court and one or more County Courts, or including the High Court and one or more Division Courts, against the same property, whether on behalf of the same plaintiff or of different plaintiffs, the application for interpleader shall be made to the High Court or a Judge thereof; and such Court or Judge shall dispose of the whole matter as if all of the writs against the property had been issued from the said Court.

1120. (1) Where an issue is directed to be tried the costs of the sheriff incurred in consequence of the adverse claim, shall be a first lien or charge upon the moneys or goods which may be found in the issue to be applicable upon the execution. (2) In addition and without prejudice to the said lien or charge the sheriff may after the issue has been directed to be tried, tax such costs and may serve a copy of the certificate of taxation upon each of the parties to the issue and the successful party upon the issue shall tax such costs as part of his costs of the cause, and upon receipt thereof shall pay over the same to the sheriff, unless he has been previously paid. (3) Where after the service of the certificate the party succeeding upon the issue neglects or refuses to tax such costs, the sheriff may obtain an order that the successful party shall pay the same. (4) Where the proceedings are compromised between the parties thereto, the costs of the sheriff shall be paid by the party by whom the execution was issued.

1121. Where after the seizure an issue is directed and the property seized remains, pending the trial of the issue, in the custody of the sheriff who seized the same, the Court or Judge may make an order for the payment to the sheriff of such sum for his trouble in and about the custody of the property as the Court or Judge deems reasonable; and the sheriff shall have a lien upon the property for payment of the same in the event of the issue being decided against the claimant to the extent to which such issue shall be so decided.

1122. The Court or a Judge may in or for the purposes of an interpleader proceeding make all such orders respecting the satisfaction or payment of any lien or charges of the applicant, and as to costs and all other matters as may be just and reasonable.

1123. Relief by interpleader may be granted in the County Courts. (1) Where the person seeking relief (hereinafter called the applicant) is under liability for any debt, money, goods or chattels, for or in respect of which he is or expects to be sued by two or more persons (hereinafter called the claimants) making adverse claims thereto; and in such case (a) Where the applicant is being so sued in a County Court the application may be to the Judge of the County Court in which the action is pending; and (b) Where the applicant is not being so sued and the debt, money, goods or chattels in question do not exceed in value \$200, the application may be to the Judge of the County Court of the county in which the applicant resides, or in which the money, goods and chattels are situate. (2) Where the applicant is a sheriff and claim is made to any money, goods or chattels taken, or intended to be taken in execution under a writ of execution, or to the proceeds or value thereof by any person other than the person against whom the writ was issued, and in such case the application may be made to the Judge of the County Court of the county in which such money, goods or chattels are so taken, or intended to be taken, notwithstanding that the writ may have been issued from another County Court, or that writs may have been issued from two or more County Courts.

1124. All subsequent proceedings shall be had and taken in the County where the application is made; but the Judge to whom the application is made may order that the subsequent proceedings be had and taken in any other County, if that course seems just and more convenient.

1125. Where the amount claimed under or by virtue of writs of execution, in the sheriff's hands, issued out of one or more Courts, does not exceed the sum of \$400, exclusive of interest and sheriff's costs, or when the goods seized are not, in the opinion of the Judge, or other person making the order of the value of more than \$400, the order directing an issue to be tried may direct that the issue shall be drawn up and tried in the County Court of the county in which the issue would, under the provisions of Rule 1124, be tried, and in such case the issue shall be drawn up, filed and tried in the County Court, and all subsequent proceedings therein up to and inclusive of judgment and execution shall be had and taken in the County Court, which shall, where any of the writs of execution were issued out of the High Court, have jurisdiction in the premises as fully as though the same had issued out of the County Court. (2) Where an application is made for an order under this rule upon the ground that the goods seized are not of the value of more than \$400, a list of the goods and of the value placed upon them shall be set out in the affidavit upon which the application is based.

1126. Where the amount of the execution or the value of the goods does not exceed \$100, the issue may be directed to be tried in a Division Court and thereafter all proceedings shall be carried on in such Court.

1127. The proceedings for and relating to the order for costs and for obtaining money out of Court when the same has been paid into Court by the sheriff and for such other purposes as may be necessary, may, in the cases provided for in the rules 1125 and 1126, be taken either in the original cause or before the

Judge of the County Court or Division Court, as the case may be, who tried the issue, and he shall have power and authority to make such order in the premises as a Judge has heretofore had in such cases.

1128. In respect of all such proceedings had in the County Court or Division Court, the costs and disbursements shall be taxed upon the County Court or Division Court scale.

6. (e) "Action," as defined by section 2 of The Judicature Act, 1896, shall include proceedings for relief by interpleader under Rules 1102 to 1128.

45. (1) The Judge of every County Court other than the County Court of York, shall in interpleader proceedings where the goods in respect of which interpleader is sought are situate in his county, have concurrent jurisdiction with, and the same power and authority, as the Master in Chambers at Toronto.

49. (1) Every Local Master who does not practise as a barrister or solicitor, and who has not taken out certificates to practise, shall, in addition to his other powers as local Master, have in interpleader proceedings, when the goods in respect of which the interpleader is sought are situated in his county, concurrent jurisdiction with and the same power and authority as, the Master in Chambers, in all proceedings now taken in Chamber, at Toronto.

162. (3) Service out of Ontario of a petition or notice of motion in interpleader proceedings may be allowed by the Court or a Judge.

377. Where an issue is directed to be tried it shall as soon as settled, be filed with the proper officer of the county in which it is directed to be tried, and thereafter, unless otherwise ordered, the proceedings in the issue shall be carried on in the same manner as the proceedings in an action commenced in such county.

The following are Statutory Provisions:

In case of an assignment of a debt or other chose in action, if the debtor, trustee or other person, liable in respect of the debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he thinks fit, to call upon the several persons making claim thereto to interplead concerning the same. (The Judicature Act, R. S. O. 1897, c. 51, s. 58 (6).)

(1) A sheriff shall not without written instructions and a bond, as hereinafter mentioned, be obliged to seize property which is in the possession of a third party claiming the same, and not in the possession of the debtor against whose property the writ or other process was issued. (2) The written instructions to be delivered to the sheriff shall specify the goods and chattels in such a way as to enable the sheriff to identify the same as the goods and chattels intended. (3) The bond is to be a bond of indemnity to the sheriff and his assigns, with two sufficient sureties, who are to justify in double the supposed value of the property, such supposed value to be stated in an affidavit by the creditor or his solicitor or agent, and attached

to the bond. (4) The bond is to be assignable to the claimant, and is to be conditioned that the parties executing the same will be liable for the costs and expenses which the sheriff or claimant may be put to by the seizure or subsequent dealings with the property, including the interpleader suit (if any), and which he does not recover from other persons who ought to pay the same. (5) In case the sheriff is not satisfied with the bond offered the matter in difference is to be determined and disposed of by a Judge. (6) Damages claimable shall be the same as before the passing of this Act. (7) Nothing in this section shall be construed to limit the right of the sheriff to apply for relief by interpleader under the present law and the practice of the Courts. (The Execution Act, R. S. O. 1897, c. 77, s. 22.)

(3) The two preceding sub-sections (regulating the division of moneys made on execution) shall not apply to any moneys received by a sheriff as the proceeds of a sale of property by him under an interpleader order; but upon the determination of the interpleader issue in favor of the creditors, the moneys whether in the sheriff's hands or in Court pending the trial of the issue, shall be distributed by the sheriff among the creditors contesting the adverse claim. (4) Where proceedings are taken by the sheriff or other officer for relief under any provisions relating to interpleader, those creditors only who are parties thereto and who agree to contribute pro rata (in proportion to the amount of their executions or certificates) to the expense of contesting any adverse claim, shall be entitled to share in any benefit which may be derived from the contestation of such claim so far as may be necessary to satisfy their executions or certificates. The Court or Judge may direct that one creditor shall have the carriage of the interpleader proceedings on behalf of all creditors interested, and the costs thereof, as between solicitor and client, shall be a first charge upon the moneys or goods which may be found by the proceedings to be applicable upon the executions or certificates. (5) "Adverse claim" in the next preceding sub-section shall mean any claim to contest which an interpleader issue is directed; and upon any interpleader application the Court or Judge shall have a discretion to allow to other creditors who desire to take part in the contest, a reasonable time in which to place their executions in the sheriff's hands, upon such terms as to costs and otherwise as may be just and reasonable. (The Creditor's Relief Act, R. S. O. 1897, c. 78, s. 4 (3), (4), (5).)

A certificate under this Act shall in interpleader proceedings be deemed to be an execution. (The Creditor's Relief Act, R. S. O. 1897, c. 78, s. 9 (3).)

The County Courts shall have jurisdiction in interpleader matters, as provided by the rules respecting interpleader. (The County Courts Act, R. S. O. 1897, c. 55, s. 23 (6).)

An appeal shall also lie to a Divisional Court of the High Court of Justice from every decision or order made by a Judge of a County Court sitting in Chambers under the provisions of the law relating to interpleader proceedings, provided always that the decision or order is in its nature final and not merely interlocutory. (The County Courts Act, R. S. O. 1897, c. 55, s. 52 (1).)

The settlement of conflicting claims and applications in respect of a number of special matters are provided for in several Canadian statutes as follows: Conflicting applications for patents (Revised Statutes of Canada, 1886, c. 61, s. 19). Conflicting applications for copyright (R. S. C. (1886), c. 62, s. 19). Conflicting claims for registry of a ship (R. S. C. (1886), c. 72, ss. 12, 13). Claims by two or more persons to a wreck comprising cargo, stores, tackle, etc. (R. S. C. (1886), c. 81, s. 33). Claims to compensation for land taken by railways (51 Vict. Canada, c. 29, ss. 167, 168). Claims to compensation for land taken by the Crown (52 Vict. Canada, c. 18, ss. 25-28). Claims to trade marks (53 Vict. Canada, c. 14, s. 1).

INTERPLEADER IN THE ONTARIO DIVISION COURTS.

(1) *Introductory.*

At Kingston, Ontario, on August 27th, 1841, was passed the Act 4 & 5 Vict. c. 53, which made provision for the recovery of small debts, in what was then known as Upper Canada. This enactment is now known as "The Division Courts Act." In 1850 a section was introduced (s. 102, 13 & 14 Vict. c. 53), which gave bailiffs relief by interpleader when claims were made to goods taken in execution by persons other than the debtor. This was almost a transcript of a similar provision in the English County Court Act, passed in 1846 (9 & 10 Vict. c. 96, s. 118).

The present special provisions governing interpleader in the Division Courts are sections 154 (2), and 277 of Revised Statutes (1897), chapter 60, and Division Court Rules Numbers 32 to 37, 77, 154 (b), and 290 (b), (c). Interpleader in this Court is to a considerable extent governed by the cases on sheriff's interpleader. There are also several *omnibus* clauses which make the Rules of Law, and the principles of practice, in the High Court, apply to matters within the jurisdiction of the Division Courts.

Section 312 of the Division Courts Act enacts that in any case not expressly provided for by that Act, or by the Rules thereunder, the County Judges may in their discretion, adopt and apply the general principles of practice in the High Court to actions and proceedings in the Division Court.

Section 75 provides that with regard to all causes of action within the jurisdiction of the Division Courts, such Courts shall have power to grant and shall grant such relief, redress, or remedy, or combination of remedies, in as full and ample a manner, as might and ought to be done in the like case by the High Court. (*Speers v. Daggers* (1885), 1 C. & E. 503.)

Section 59 of the Ontario Judicature Act provides, that the rules of law enacted by that Act, are to be in force and to receive effect in all Courts whatsoever in Ontario, so far as the matters to which such rules relate shall be respectively cognizable by such Courts.

One of the rules of law enacted by the Judicature Act, section 58 (5), is, that a debtor, trustee, or other person, may interplead when the debt or chose in action has been assigned and conflicting claims are made. It is only, however, in cases not expressly provided for by the Division Courts Act and Rules

that the County Judges may in their discretion adopt and apply the general principles of practice in the High Court, to actions and proceedings in the Division Courts (*Clarks v. Macdonald* (1883), 4 Ont. 310.)

There is no special provision for interpleader by an ordinary stakeholder in the Division Courts. The effect of section 112 of the Act, may be, to give such relief to a defendant in an action. Thus, a Division Court Judge may, at any time after action commenced, upon the application of either party, and upon such terms as may appear just, order that the name of any party who ought to have been joined in the action as a defendant, shall be added as a party defendant (sub-section 1); and if it shall appear to the Judge either before, or at the trial of an action, that any party ought to be added as a party defendant in order that the Court may settle all rights and questions involved in the action, the Judge may order such persons to be added accordingly (sub-section (2), see also Rule 211). Under these provisions a defendant in the Division Court claiming no interest in the subject matter, and showing that a third party is also claiming the same property, may properly ask the Judge to have the third party so claiming brought in as a defendant.

If the defendant in a Division Court suit be a debtor, trustee, or other person liable in respect of a debt or chose in action, there would seem to be jurisdiction under sections 58 (5) and 59 of the Judicature Act, to allow such a defendant relief by interpleader, when conflicting claims are made to the debt or chose in action.

In garnishee proceedings, if it is claimed that the debt sought to be attached belongs to any third person, or that such person has a lien or charge on it, the Judge may order such third person to appear and state the nature and particulars of his claim; the Judge shall also give such decision between all parties as he shall consider just, and may bar the claim of such third person in whole or in part, or make such order with respect to the lien or charge, and as to costs, as he shall think just and reasonable. (Rule 77.)

(2) *Bailiff's Duty before Interpleading.*

When a Division Court bailiff has seized property under an execution or attachment, as belonging to a judgment or absconding debtor, and finds that there is an incumbrance or lien upon the property, or that a claim has been made thereto by a landlord for rent, or by a person not being the party against whom the process issued, it is the duty of the bailiff forthwith to notify the party who issued the process of such incumbrance, lien or claim. (Rule 35 (f).)

If the party issuing the process insists upon the bailiff maintaining such seizure, he must deposit with the clerk a sufficient sum of money to indemnify the clerk and the bailiff against their costs of an interpleader. If he neglect or refuse to do this, the bailiff may in his own discretion abandon the seizure, and the party who issued the process will be barred unless the Judge shall otherwise order. (Rule 35 (f).)

(3) *When a Bailiff may Interplead.*

The applicant for relief by interpleader in the Division Courts is the officer charged with the execution of the process of the Court; section 277 (1)—An interpleader summons is issued for the protection of the bailiff, and he is entitled to the protection which it was intended the statute should give him. (*Oliphant v. Leslie* (1865), 24 U. C. Q. B. p. 404.)

The subject matter must consist of goods or chattels, property or security, taken in execution or attachment under the process of a Division Court, or the proceeds or value thereof. Goods or chattels includes cattle, sheep, and other animals, money and money's worth; section 277 (1), Rule 2 (2)—There must be a taking in execution by the bailiff, because there is no lien on a debtor's goods until the bailiff actually seizes. (*Watts v. Howell* (1861), 21 U. C. Q. B. 259; *Culloden v. McDowell* (1859), 17 U. C. Q. B. 359). The bailiff should be in possession of the subject matter when he applies for a summons, or have an equivalent in security or money; although where a claimant had replevied the goods the bailiff was allowed to interplead. (*Caron v. Graham* (1859), 18 U. C. Q. B. 315.)

The adverse claim must be made by some person other than the debtor against whom the process issued; while a landlord claiming for rent is particularly mentioned as a possible claimant, 277 (1). If there be no dispute as to the terms of the letting, and the landlord claims only such rent as sections 278 and 279 of the Act allow him, there will be no need for the bailiff to interplead. The claim must be something more than a mere passing one. Thus, when money was in the hands of a clerk, and a third party notified him not to pay it over but took no effectual steps to compel payment, it was held that the notice not to pay gave the third party no right, and the clerk incurred no hazard, by refusing to pay attention to it. (*McDonald v. Reid* (1877), 25 Grant, 139.) The claim need not be in writing nor in any particular form.

If a Division Court bailiff take goods under an execution against A, and a sheriff claim them under an execution against B, the sheriff cannot take them, but he may give notice to the bailiff, and the bailiff may then interplead. (*McMaster v. Meakin* (1877), 7 P. R. p. 213.)

The time for making the application is either before or after an action has been brought against the officer, section 277 (1). The section does not authorize a bailiff, when a claim is made, to sell the goods and issue an interpleader for the proceeds, because this would compel the claimant to try his right merely to such proceeds and deprive him of his goods. (*Reid v. Macdonald* (1876), 26 U. C. C. P. 147); it was held in an earlier case that the interpleader proceedings were not invalid as having taken place after the sale. (*Harmer v. Cowan* (1864), 23 U. C. Q. B. 479.)

(4) *The Application and Summons.*

The first step after the seizure and claim, and after the creditor has made a deposit with the clerk to cover costs, is an application by the bailiff for a summons to the clerk of the Court from which the process issued or to the clerk of the

Court held for the division in which the seizure was made, at the option of the bailiff, calling the creditor and the claimant, to such Court. [Section 277 (1), and Rule 35 (d), (e).] The application sets out the execution, the seizure, the adverse claim, the value of the property, and the bailiff's request that an interpleader summons issue to the plaintiff and the claimant. (See Division Court, Form 4.)

If the bailiff has more than one execution or attachment, at the suit or instance of different persons against the same property, it is not necessary for him to make a separate application on each execution or attachment, but he may use the names of such execution or attaching creditors collectively in such application. (Section 277 (4).)

The clerk next issues a summons calling the execution creditor and the adverse claimant before the Court out of which the process issued, or before the Court holden for the Division in which the seizure under the process was made. [Section 277 (1).] The clerk should not issue an interpleader summons until the bailiff has applied for it. Where a clerk did so, and both parties appeared, and submitted to the jurisdiction, it was held that the proceedings were not void: *Regina v. Doty* (1856), 13 U. C. Q. B. 400.

The summons notifies the claimant to appear at the Court, touching the claim made by him to the property in question, which has been taken in execution, and that if he fail to establish his claim the property will be sold, or the money paid, according to the exigency of the process. He is also notified that he is required five days after service of the summons to deliver or leave with the clerk, a particular of the goods claimed, and the grounds of his claim. (Form 5 to Rules.)

The summons notifies the execution creditor to appear and maintain his right to have the goods sold to satisfy his claim. Both parties are notified in the summons that every claim will be adjudicated upon at the sittings. An interpleader summons is served on the claimant and creditor, or upon any solicitor or agent who acts for the claimant or creditor, in such time and manner, as is directed for service of an ordinary summons to appear. (Rules 32 and 35 (d).)

The summons may issue with the names of the execution or attaching creditors as plaintiffs [section 277 (4)], but on the return the claimant is made plaintiff (Rule 37).

When the application is made in respect of goods taken in attachment, the matter is subject to the provisions of the Act respecting absconding debt *s.a.* Revised Statutes, chapter 79, (Section 277 (1).)

(5) Particulars to be given by Claimant.

The claimant must within five days after the day of service of the summons upon him, deliver to the bailiff, or leave at the office of the clerk of the Court, a particular of any goods or chattels, property or security, alleged to be his, and the ground of his claim, set forth in ordinary and concise language. (Rule 33 and Form 6.)

The claimant should state that he claims the goods and chattels seized, specifying them, and the grounds of claim, in ordinary language; the particulars on which the claim is

grounded, as how acquired, from whom, when, and the consideration paid or to be paid, and that he will maintain and prove these matters. If any action for the seizure has been commenced, this should be stated, and also how the action stands.

When a landlord claims for rent he must show in his particulars the amount claimed, the period for which it is due, the demised premises, and the terms of the holding. (Rule 33 and Form 9.)

It has been held that great strictness should not be exacted from a claimant in respect of particulars. The test appears to be, are they calculated to mislead (*Es. p. McFee* (1853), 9 Ex. 261). In the following cases the particulars have been held sufficient:

A claim to the goods, stating that they had been assigned to the claimant by deed, giving the date and parties, although it did not appear that the deed was good as against creditors. (*Queen v. Richards* (1851), 2 L. M. & P. 263; 20 L. J. Q. B. N. S. 350.)

Where it was alleged that the goods and effects in and about the house and premises of the defendant, situate at North Camp, seized under the writ of execution, were the property of the claimants, the trustees appointed by a deed dated, etc., by which the judgment debtor conveyed all his estate and effects to the claimants absolutely, to be administered for the benefit of all the creditors, as if he had been adjudicated bankrupt. (*Churchwarden v. Coleman* (1866), L. R. 2 Q. B. 18).

Particulars alleging "that by a certain indenture, dated, etc., and made between the judgment debtor of the one part, and me of the other part, the judgment debtor granted and assigned unto me, all the household goods, furniture, personal estate, and effects, etc., about his houses, brewery and premises," and claiming all such goods as aforesaid mentioned, which had been seized under the writ. (*Queen v. Stapylton* (1851), 20 L. J. Q. B. N. S. 350.)

The following particulars have been held insufficient: A notice by a claimant, "that the goods are and were my own property, and not the property of the debtor" (*Ex. p. Tanner* (1850), 19 L. J. Q. B. 318.) Particulars describing the property as the goods and money seized by virtue of the warrant, and the ground of claim that the goods were the property of the claimant, and were at the time of seizure in his possession, held insufficient, although upon appeal the Court was equally divided (*Richardson v. Wright* (1875), L. R. 10 Ex. 367).

When the claimant claims damages from the creditor, or from the bailiff, for, or in respect of the seizure of the property, he must, in the particulars of his claim to the goods, state the amount he claims for damages and the grounds upon which he claims such damages. (Rule 35 (a), Form 7.)

(6) *Particulars to be Delivered by Creditor.*

Where a creditor claims damages against a bailiff arising out of the execution of any process, he must five clear days before the day upon which the interpleader is to be tried, deliver to the bailiff a notice of such claim, stating the amount and the grounds for the claim. (Rule 35 (b), Form 8.)

(7) *Subject Matter pending Interpleader.*

When the adverse claim is made the bailiff has either got the goods he seized, or their proceeds if he has sold them. If he has the money he should pay it into Court, where it is retained by the clerk until the claim has been adjudicated upon (Rule 33).

If the claimant desire possession of the property seized, the bailiff must re-deliver it to him, upon his depositing with the bailiff the value of the property, or the amount of the execution, whichever is least. If there be any disagreement as to the value of the property, the matter will be decided by the clerk or the judge. The deposit is then paid by the bailiff into Court, to abide the decision of the Judge upon the claim. (Rule 35 (9).)

If the goods be of a perishable nature, or if they are cattle and require food and keep, or if for any other just and sufficient cause it may appear proper to sell at once, the Judge may upon the application of any party make such order as he may think reasonable for the sale by the bailiff or by any person named in the order (Rule 36).

If the claimant wish to prevent a sale he may deposit with the bailiff the value of the property, to be fixed by appraisement in case of dispute; or the sum which the bailiff shall be allowed to charge as costs for keeping possession until a decision can be obtained. In default of the claimant so doing the bailiff sells the goods, as if no such claim had been made, and pays into Court the proceeds to abide the final decision of the matter. (Rule 37, and see *Cramer v. Matthews* (1881), 7 Q. B. D. 425). If the claimant do not prevent a sale by paying in the value of the goods and the bailiff sells, the claimant succeeding cannot recover the value of the goods, but only the proceeds of sale: *Holmes v. Dunstall* (1868), 2 South Australia, 28.

The bailiff must not retire from possession, because an interpleader summons has been issued (*Ex p. Summers* (1854), 18 Jur. 522). It was formerly held, that if the bailiff sold after a claim had been made, and before the claim had been adjudicated upon, he could not give the purchaser a good title, and if the claimant succeeded, he could replevy his goods from the bailiff's purchaser (*Reid v. Macdonald* (1876), 26 U. C. C. P. 147).

(8) *Damages claimed may be paid into Court.*

Where a claim for damages is made against a bailiff and creditor, or against either of them, they, or either of them, may pay into Court money in full satisfaction of such claim for damages, and such payment into Court shall be made in the same manner and have the same effect, as if the proceeding were an action in which the claimant was plaintiff and the bailiff and creditor defendants. (Rule 35 (c).)

(9) *Proceeding to Trial.*

The interpleader matter is tried by the Judge in a summary way, without formal pleadings or joinder of issue, on the day named in the summons. The Judge may in his discretion change the place of trial from the Court where the process issued, to the Court of the division in which the seizure took place, or *vice versa*. (Rule 35 (e).)

In all interpleader issues, where the money claimed, or the value of the goods claimed, or the proceeds thereof, exceeds \$100; or when the damages claimed by either party against the other, or against the bailiff, exceeds the sum of \$60, the clerk puts the matter at the foot of the trial list, with ordinary actions for over \$100, and the other business of the Court is disposed of first, unless the Judge for special reason otherwise order. (Sections 121, 154 (2), 161 (2), Rule 155 (6).)

Either party to an interpleader issue in a Division Court may require a jury to be summoned to try the issue. In such case he must within five days after the service of the summons on him give to the clerk, or leave at his office, notice in writing requiring a jury, and shall at the same time pay to the clerk the proper fees for the expenses of the jury, and thereupon a jury is summoned according to the provisions of the Act (section 161 (1)). This section does not give the bailiff a right to a jury if damages are claimed against him, although he may possibly have that right under section 160, which provides that either party may require a jury in all cases when the amount sought to be recovered exceeds \$30.

Where the money claimed, or the value of the goods and chattels claimed, or the proceeds thereof, exceeds \$100; or where the damages claimed by either party against the other, or against the bailiff, exceeds the sum of \$60, the Judge must, when no agreement not to appeal has been signed and filed, take down the evidence in writing, and leave the same with the clerk of the Court, sections 122, 154 (3), 161 (3). This provision was enacted in 1884 (47 Vict. c. 10, s. 10), before that date it had been held, that it was not necessary to take down the evidence in writing, upon the trial of an interpleader issue. (*Bank of Montreal v. Statten* (1881), 1 C. L. T. 66.)

If the goods or chattel property or security, are seized or attached, while in the possession of the claimant, the case proceeds as if the execution creditor were the plaintiff, and the claimant were the defendant. In all other cases it proceeds as if the claimant were the plaintiff, and the execution or attaching creditor the defendant [Rule 32 (a)]. It should be noticed that section 277 (4) provides that the summons may issue in the name of the creditor as plaintiff.

The Judge adjudicates upon the claim and makes such order between the parties as to him seems fit [Section 277 (3)]. It is not sufficient for the Judge to say between an execution creditor and a claimant, that the goods are included in a settlement, leaving undecided whether the deed is valid or not. It is his duty to pronounce a decision which will adjust the claim and protect the bailiff, he must decide one way or the other. If he fail to do so a mandamus will be granted by a Superior Court to compel him to complete the adjudication. (*Ex p. Waldron* (1870), 9 N. S. Wales S. C. R. 329.)

If the claimant fail to deliver particulars as required, the Judge may, upon such terms as he shall direct, allow him to deliver the same (Rule 34). It would seem, that if the particulars delivered are not sufficient, the Judge may refuse to hear evidence in support of the claim, and give judgment for the execution creditor with costs. (*Ex p. Tanner* (1856), 19 L. J. Q. B. 318; *Richardson v. Wright* (1875), L. R. 10 Ex. 367).

Where a Judge refused to adjudicate upon the claim filed on the ground that the particulars did not distinguish the portion of the goods seized, to which the claimant alleged he was entitled, it was held that he should have determined to what part the claimant was entitled. (*Queen v. Stappilton* (1851), 15 Jur. 1177; 21 L. J. Q. B. 8.)

The Judge's decision with respect to the sufficiency of particulars is not conclusive [*Ex parte McFee* (1853), 9 Ex. 261]. A Superior Court will intervene, when the Judge improperly holds the particulars insufficient (*Whitehead v. Procter* (1855), 3 H. & N. 532; *Churchwarden v. Coleman* (1866), L. R. 2 Q. B. 18), and will remit the matter to the Division Court for re-hearing.

The Judge of a Division Court may, notwithstanding section 71, entertain an interpleader application, to try the question of property in goods, even though the enquiry may involve the title to land. The Judge himself must decide such application without the aid of a jury. (*Munzie v. McKinley* (1864), 15 U. C. C. P. 50.)

On an interpleader in the Division Court, the jurisdiction of the Judge is not confined to the question of legal property. The words of the statute "to adjudicate upon the claim and make such order between the parties in respect thereof as to him seems fit," are large enough to embrace equitable claims, and convenience is strongly in favour of the jurisdiction. (*McIntosh v. McIntosh* (1871), 18 Grant, 58.)

The Judge in adjudicating between the execution creditor and the adverse claimant, also adjudicates between these parties, or either of them, and the officer or bailiff, in respect of any claim to damage, arising or capable of arising out of the execution of the process, and may make such order in respect thereof as to him shall seem fit (section 277 (3); thus, a claimant may be awarded damages for the trespasses committed in seizing his goods, in addition to his claim to the goods themselves. (*Death v. Harrison* (1870), L. R. 6 Ex. 15; *Mercer v. Stanbury* (1856), 25 L. J. Ex. 316; *Tinkler v. Hilder* (1849), 4 Ex. 187.)

The Division Court Judge has power to adjudicate upon, and to award damages, even though the amount of damages claimed, found, or awarded, should be beyond the jurisdiction of a Division Court, section 277 (5). The Court has power to adjudicate upon all claims of whatever amount, arising in the manner described in this section. (*Smith v. Benakin* (1893), 94 L. T. Journal, 285.]

The claimant should seek all the relief he thinks himself entitled to upon the Division Court interpleader, whether to the goods themselves, or for damages or for both. (*Death v. Harrison* (1870), L. R. 6 Ex. 15.)

The fact that the execution creditor does not direct the bailiff to give up the goods to the claimant, but appears and contests his title, is no evidence of a ratification by the execution creditor of the bailiff's detention. (*Tappin v. Buckerfield* (1883), 1 C. & E. 157.)

When damages are claimed in any interpleader proceeding the parties and the bailiff have the same right of defence and counterclaim, as would exist, had an action within the jurisdiction of the Division Court been brought, to recover such

damages with the claimant plaintiff, and the bailiff and creditor defendants. (Section 277 (6), Rule 35 (c).)

By consent of all parties, or without such consent if the Judge so direct, an interpleader claim may be tried, although the Division Court Rules may not have been complied with. (Rule 33.)

The usual interpleader order reads "adjudged that the goods mentioned in the interpleader summons, are (or are not) the property of the claimant, ordered that the costs of the proceedings be paid by." (Rule 125, Forms 10 to 16.)

An order made upon the return of an interpleader summons is enforced in like manner as an order made in an action brought in the Division Court. (Section 277 (3), Form 17.)

(10.) Costs.

In interpleader proceedings in the Division Court the parties have the same right to and liability for costs as exist "had an action been brought [section 277 (6)]; but before the bailiff is obliged to maintain his seizure, to enable a creditor to contest a claim in interpleader, the creditor must deposit with the clerk a sufficient sum of money to indemnify the clerk and the bailiff against their costs of an interpleader. (Rule 35 (f).)

The Judge in adjudicating upon the adverse claim, makes such order between the parties as to the costs of the proceedings as he sees fit (section 277(3)); and in adjudicating upon any claim to damages between the parties, or between them and the bailiff or officer, makes such order as to costs between these parties as he shall see fit. (Section 277 (3).)

When the claimant fails the costs of the bailiff are allowed to him out of the amount levied, unless the Judge otherwise orders. (Rule 35.)

If the money in dispute, or the value of the subject matter claimed, exceeds \$100; or where the damages claimed by or awarded to either party against the other, or against the bailiff, exceeds the sum of \$60, and a counsel, solicitor, or agent has been employed by the successful party, the Judge may in his discretion direct a fee of \$5, to be increased according to the difficulty and importance of the case to a sum not exceeding \$10, to be taxed to the successful party, and the same when so allowed is taxed by the clerk and added to the other costs. (Sections 154 (2), 161 (2), and 214; Rule 290 (b) and (c).) But the agent must be a barrister or solicitor. (Rule 288.)

Where an issue was decided against the claimant, who was ordered to pay the costs of the interpleader proceedings, the bailiff paid the amount of the levy into Court, deducting the fees and expenses of the levy, but not the costs of the interpleader, and the balance was paid to the execution creditor. It was held that the bailiff could not maintain an action against the execution creditor for the interpleader costs. (*Bloor v. Huston* (1854), 15 C. B. 266.)

Where the claimant in a Division Court interpleader has brought an action in the High Court, or in a local or inferior Court in respect of his claim, such Court may, on proof of the issue of the interpleader summons, and that the property has been taken in execution, or upon attachment, order the claimant to pay the costs of all proceedings in the action after the issue of the summons out of the Division Court (section 277 (2)). The

claimant may be liable for the costs of the action from the time the clerk issues the summons, although he may not have notice of the interpleader proceedings, until the summons is served upon him. It is to be remarked that the costs of such an action, incurred before the issue of the summons, are not provided for. If the claimant succeeds in the interpleader proceedings in the Division Court, it would seem proper, that he might then move in the action for such prior costs; and if he fails the opposite party might apply in the same way for costs against him.

The fees payable to the clerk for his own and the bailiff's costs are regulated by the value of the goods. (See Tariff items.)

(11) *New Trials.*

An interpleader order is final and conclusive between the parties, and as between them and the officer or bailiff, except, that upon the application of either the attaching or execution creditor, or the claimant, or the officer or bailiff, within fourteen days after the trial, the Judge may grant a new trial, upon good grounds shown, as in other cases under the Act, upon such terms as he thinks reasonable and may in the meantime stay proceedings. (Section 277 (§).)

This provision was enacted in 1869 (32 Vict. c. 23). Before that date, the decision of the Judge was final, and there was no power to grant a new trial. (*Regina v. Doty* (1856), 13 U. C. Q. B. 400; *Keane v. Stedman* (1861), 10 U. C. C. P. 435.)

The application for a new trial is too late, unless it is made within the first fourteen days after the trial. (*Re Foley v. Moran* (1886), 11 Ont. Pr. 316; *Bland v. Rivers* (1890), 19 Ont. 407.

The evidence, if taken down by the Judge and filed with the clerk, in the event of an application for a new trial, is forwarded to the Judge by the clerk, for the purposes of such application (sections 121, 161 (2), Rule 172). The right to appeal is not lost because the Judge omits in an appealable case to take down the evidence at the trial in writing. (*Sullivan v. Francis* (1890), 18 Ont. App. 121. It was also remarked by Osler, J., in this case, p. 122, that it is by no means clear that section 121 is extended to interpleader.

(12) *Appeals.*

An appeal lies to a Divisional Court of the High Court of Justice from the decision of a Division Court Judge upon an application for a new trial in interpleader, where the money claimed, or the value of the goods and chattels claimed, or of the proceeds thereof, exceeds \$100, or when the damages claimed by or awarded to either party, against the other, or against the bailiff exceeds \$60. (Section 154 (2).)

Where the landlord appears upon the hearing of an interpleader summons, he, as well as the execution creditor and the claimant, has a right of appeal. (*Wilcoxon v. Searby* (1860), 29 L. J. Ex. 154.)

The right of appeal from the Division Court in interpleader, was first given in 1884 (47 Vict. c. 10, s. 9), before that there was no appeal. (*Re Turner v. The Imperial Bank* (1881), 9 Ont. Pr. 19.) There is no appeal, not even by leave of the Judge, where

neither the money claimed, nor the value of the goods and chattels claimed or the proceeds thereof exceeds \$100. (*Collis v. Lewis* (1887), 20 Q. B. D. 302.)

An appeal lies when the value of the goods seized exceeds \$100, although the claim in the original plaint is less than \$100 (*Vallance v. Naish* (1858), 27 L. J. Ex. 142); and where a claimant paid \$60 into Court, as the appraised value of the goods, and afterwards appealed, alleging that the goods were greater in value than \$100, the appeal was dismissed, on the ground that it could only relate to the sum in Court. (*White v. Milne* W. N. (1887), 256. See also *Lumb v. Teal* (1839), 22 Q. B. D. 675.)

Where judgment was given for the execution creditor with costs, and the claimant having succeeded on appeal in getting a new trial directed, it was held that the whole judgment, including that part of it which related to costs, was thereby reversed. (*Gage v. Collins* (1867), L. R. 2 C. P. 381.)

Upon an appeal the bailiff has no right to appear to protect his costs, unless his conduct is the subject matter of appeal, or unless the mode of relief by interpleader is in dispute. (*Kilpatrick v. Gilliam* (1890), 15 Vict. Law R. 673.)

An interpleader issue in a Division Court is not within section 82 of the Act, and so is not removable by *certiorari* into the High Court. (*Russell v. Williams* (1862), 8 U. C. L. J. O. S. 277; *Es p. Summers* (1854), Jur. 522.)

No appeal lies if, before the Court opens, or if without the intervention of the Judge, before the commencement of the trial, there shall be filed with the clerk, in any case, an agreement in writing not to appeal, signed by both parties or their solicitors or agents, and the Judge shall note in his minutes, whether such agreement was so filed or not, and the minutes shall be conclusive evidence upon that point. (Sections 122, 161 (2).)

On an issue between a chattel mortgagee and an execution creditor, the debtor and the claimant were the only witnesses, and although they both swore to the *bona fides* of the claim, the Court of Appeal refused to set aside a verdict for the execution creditor. (*Ross v. Haenel* (1897), 23 U. C. L. J. 412.)

When an issue has been sent from the High Court for trial in a Division Court, and an order is made without jurisdiction affecting the sheriff, he cannot appeal, but should apply for a prohibition. (*Temple v. Temple* (1894), 10 R. 269.)

(13) Actions Stayed.

Upon the clerk issuing the interpleader summons in the Division Court, any action which has been brought in the High Court, or in a local or inferior Court in respect of the claim, is thereupon stayed. (Section 277 (1).)

The application to stay proceedings must be made to the Court, or a Judge of the Court, in which such action is pending. (*Washington v. Webb* (1858), 16 U. C. Q. B. 232.) The defendant must prove the issue of the summons, and that the goods and chattels, or property or security, were taken in execution or upon attachment. (Section 277 (2).)

It is to be observed, that when the section provides, that the action shall be stayed, the words used can only mean that

the action is for the time delayed. The matter in dispute in the action is not thus finally disposed of. However, by virtue of the full jurisdiction given the Division Court Judge by section 277 (3), he has power to adjudicate upon any damage or claim arising or capable of arising out of the execution of the process; and as will presently appear, if any party neglects to raise, or to have such damage or claim disposed of in the interpleader proceedings in the Division Court, it cannot afterwards be raised in an action in any other Court.

An action brought by the claimant against the bailiff, or other officer of the Court, will be stayed, even though the goods were sold before the interpleader proceedings were commenced; but an action against the purchaser of the goods from the bailiff will not be stayed. (*Hills v. Renney* (1880), L. R. 5 Ex. D. 313.)

Where a claimant replevied the goods which had been seized by the bailiff, upon the latter interpleading, it was held that the proceedings in the replevin action must be stayed. (*Caron v. Graham* (1859), 18 U. C. Q. B. 315.)

Before March 30th, 1885, the Division Court Judge could adjudicate upon the claim only. After that date, his powers were extended, so that he was bound to adjudicate between the execution creditor and the claimant, or either of them and the bailiff, in respect of any damage or claim arising or capable of arising out of the execution of the process by the bailiff (section 277 (3)). It has been held under this provision, that upon an interpleader proceeding in respect of a claim to goods taken in execution, any claims between the parties themselves for damages arising out of the execution of the process must also be brought before and be adjudicated upon by the Judge who hears the summons. Whether such claims are thus brought forward or not, the adjudication upon the summons is final and conclusive between the parties, and no action can afterwards be maintained in respect of them. (*Fox v. Symington* (1886), 13 Ont. App. 296; *Doath v. Harrison* (1870), L. R. 6 Ex. 15.)

Before 1885 it was held, that the Courts had no power to stay proceedings in an action brought after the adjudication by the Judge in the Division Court. (*Schamehorn v. Trask* (1870), 30 U. C. Q. B. 543.) A successful claimant might afterwards sue the execution creditor, for damages for trespass in the seizure of the goods (*Jones v. Williams* (1859), 4 H. & N. 706), and might also sue the bailiff (*Farrow v. Tobin* (1884), 10 Ont. App. 69; *Foster v. Pritchard* (1857), 2 H. & N. 151). If the claimant were unsuccessful he was not allowed to sue the bailiff for trespass in seizing the goods. (*Jessop v. Crawley* (1850), 15 Q. B. 213; *Finlayson v. Howard* (1853), 1 Ont. Pr. 224.)

If an action be brought after the interpleader summons has been issued, and heard, the adjudication by the Division Court Judge may properly be pleaded as a defence (*Fox v. Symington* (1886), 13 Ont. App. 296); and the regularity of the proceedings on the interpleader summons cannot be enquired into (*Finlayson v. Howard* (1853), 1 Ont. Pr. 224); and where the minute made by a Division Court Judge was informal, in adjudging that the goods were "the property of the execution creditor," instead of saying that they were not the property of the claimant, it was held in substance a dismissal of the claimants claim, and a protection to the bailiff. (*Oliphant v. Leslie* (1865), 24 U. C. Q. B. 398.)

Where a claimant did not appear and was barred, and the goods having got into the possession of the claimant, the bailiff brought an action to recover them, it was held that the minute made by the Division Court Judge barring the claimant with costs was equivalent to stating that the claim had been dismissed, and was final and conclusive upon the defendant, and he could not be heard to say that the bailiff had not seized the goods. (*Hunter v. Vanstone* (1882), 7 Ont. App. 750.)

The wrongful Act of a bailiff in seizing by mistake the goods of a stranger, is not misconduct or neglect of duty for which his sureties are liable. *McArthur v. Cool* (1860), 19 U. C. Q. B. 476.)

Oregon.—The Courts follow the general equitable rules applicable to interpleader: *Pope v. Ames* (1890), 25 Pac. Rep. 393; *Fahie v. Lindsay* (1880), 8 Oreg. 474. Section 40, under Title I., of the Code of Civil Procedure of 1885 is as follows:

In any action for the recovery of specific personal property, if a third person demand of the defendant the same property, the Court in its discretion, on motion of the defendant, and notice to such person, and the adverse party, may, before answer, make an order discharging the defendant from liability to either party, and substitute such person in his place as defendant. Such order shall not be made but on the condition that the defendant deliver the property or its value to such person as the Court may direct, nor unless it appears from the affidavit of the defendant, filed with the clerk by the day he is otherwise required to answer, that such person makes such demand without collusion with the defendant. The affidavit of such third person as to whether he makes such demand of the defendant may be read on the hearing of the motion.

Pennsylvania.—With respect to interpleader in this State, a learned Judge in 1833, after reciting the principles of interpleader as followed in the Court of Chancery in England, said *inter alia*: We have no Court of Chancery, but the practice of permitting a party to interplead has long been well known: *Coates v. Roberts* (1833), 4 Raw. 100, and see also *Wallace v. Clingen* (1848), 9 Pa. St. p. 51; *Brownfield v. Canon* (1855), 25 Pa. St. 301; *Russell v. Church* (1870), 65 Pa. St. 9; *Philadelphia v. Clarke* (1881), 15 Phil. 289.

In 1836 the Legislature adopted that part of the English Statute of 1831 which allowed relief to defendants, and in the same year the principles and practice by bills of interpleader were confirmed. In 1848 a provision for sheriffs, following the English Act, was enacted, which, with subsequent amendments, was codified in the laws of 1897.

Public Law 77 of 11th of March, 1836.—Section 4. The defendant in any action which shall be brought in the said Court for the recovery of money, or of any goods chattels or the value thereof in damages, which shall have come lawfully to his hands or possession, may at any time after the declaration filed, and before plea pleaded, by a suggestion to be filed of record, disclaim all interest in the subject matter of such action and offer to bring the same into Court, or to pay or dispose thereof as the Court shall order, and if he shall also allege under oath or affirmation that the right thereto is claimed by or supposed to belong to some person not a party to the action (naming him or

them), who has sued or is expected to sue for the same, or shall show some probable matter to the Court to believe that such suggestion is true, the said party (Court) may thereupon order the plaintiff to interplead with such third person, and make such rules and orders in the cause and issue such process for the purpose of making such third person party to the action, and for carrying such proceedings to interplead into full and complete effect, and may render such judgment or judgments thereon as shall be agreeable to the rules and practices of the law in like cases.

Section 5. If the process issued upon an order to interplead, as aforesaid, shall not be actually served, or personal notice thereof shall not be given to such third person, the said Court shall have power upon giving judgment for the plaintiff, to require him to enter into a recognizance, and if they shall think it necessary, with sufficient surety, to interplead with such third person, if afterwards, and before the expiration of the time which would be allowed to him to prosecute his claim against the defendant, such third person should appear in the said Court, and claim such money, or such goods or chattels or the value thereof.

Extended to Berks and Schuylkill counties by Act 27, March, 1848, P. L. 265. See *Hoffman v. McBride* (1836), 2 Miles Pa. 24, as to practice under. Remedy will lie in an action of trover, *Tierman v. Steille* 1 T. & H. Pr. 433.

Public Law 789 of 16th June, 1836.—Section 13. The Court of Common Pleas for the said City and County (of Philadelphia) shall besides the powers and jurisdiction aforesaid, have the power and jurisdiction of Courts of Chancery so far as relates to the determination of rights to property or money claimed by two or more persons, in the hands or possession of a person claiming no right of property therein.

Public Law 80 of 26th May, 1897.—An Act relating to proceedings when goods or chattels have been levied upon or seized by the sheriff, and claimed to belong to others than the defendant in the execution or process.

Section 1. Be it enacted, etc., that whenever goods and chattels have been levied upon or seized by the sheriff of any county under any execution or attachment process issued out of any Court of this Commonwealth, and the sheriff has been notified that said goods and chattels, or any part of them, belong to any person or persons other than the defendant or defendants in said execution or process, said sheriff shall enter a rule in the Court out of which said execution or process issued on the supposed owner (hereinafter called the claimant), to show cause why an issue should not be framed to determine the ownership of said goods and chattels; notice of the said rule shall be given to the plaintiff and defendant in said execution or process, the claimant, and the person or persons found in possession of the goods and chattels levied upon or seized.

Section 2. If the Court shall make said rule absolute, the claimant shall give bond to the Commonwealth of Pennsylvania with security to be approved by the Court in double the value of the goods and chattels claimed, conditioned that he shall at all times maintain his title to said goods and chattels and pay the value thereof to the party thereunto entitled, and thereupon the sheriff shall deliver said goods and chattels to the claimant.

Section 3. Such bond shall enure to the benefit of the plaintiff in the execution or process, or of any other person who may be adjudged to have the right or title to said goods or chattels, or any part thereof, and successive suits may be brought thereon to the use of such persons until the amount thereof is exhausted.

Section 4. If there be more than one execution or process issued against said goods and chattels, only one bond shall be filed in the Court out of which the first execution or process issued, but notice of an intention to present security for approval shall be given to the plaintiff in every such execution or process, and to the person found in possession of such goods and chattels.

Section 5. If the goods and chattels levied on are found in the possession of the claimant or his agent or bailee, and not in the possession of the defendant in the execution or process, the Court may permit the claimant to file his own bond upon it being shown that the claimant does not derive his title thereto by, from or through, the said defendant.

Section 6. The value of the goods and chattels claimed shall be determined by appraisers appointed by the sheriff, subject to the approval thereto by the Court.

Section 7. The cost of making an appraisement of the said goods and chattels shall be the sum of four dollars, which shall form part of the costs of the cause, and shall be paid by the claimant at the time of making his claims, if the defendant in the execution shall be found in possession of said goods and chattels, and by the plaintiff in the execution if some other person be found in possession thereof. If the plaintiff in the execution, or the claimant, fails to pay said sum when required under this Act so to do, it shall be treated as an abandonment of the levy or right to have the goods and chattels themselves, as the case may be.

Section 8. The appraised value thus ascertained shall be prima facie evidence of the real value in any proceeding touching the ownership of said goods and chattels, but at the trial the real value thereof may be shown to be more or less than the appraised value, and a verdict and judgment may be rendered against the claimant up to the value of said goods and chattels as so proven.

Section 9. If the plaintiff in the execution or process voluntarily relinquish or abandon the lien of the levy upon the goods and chattels levied upon, or seized and claimed as aforesaid, the sheriff shall retain possession of the goods and chattels so claimed for a period of 48 hours after the notice of such relinquishment or abandonment shall have been given by the sheriff to the claimant, so that the claimant may have an opportunity to take other proceedings to recover possession of the claimed goods.

Section 10. In the issue to be framed under this Act the claimant shall be the plaintiff, and all other parties thereto shall be defendants. The issue shall consist of a concise statement of the source of the claimant's title, signed and sworn to by him, or by some one in his behalf, and an affidavit to be filed by the defendant or defendants in the issue that he verily believes the title of the plaintiff therein to be invalid, and if the defendant fail or refuse to file said affidavit within fifteen days after notice of a rule to file same, the Court shall upon motion of the claimant enter judgment against the defendant for want of such

affidavit. The Courts of common pleas may make general rules governing the proceedings under this Act, not inconsistent herewith, and may grant new trials of such issues, and the judgment recovered shall be subject to appeal to the Supreme Court or Superior Court as in other cases. By leave of Court other parties may be allowed to intervene and become parties to the issue, with like rights and remedies as if made parties at the commencement of the proceedings.

Section 11. The bond and claimant's statement of title shall be filed within two weeks after the sheriff's rule for an issue shall be made absolute, unless the Court, for cause shown, shall extend the time for doing so.

Section 12. If the claimant fail to give a bond, but otherwise files his statement of title within the time herein specified, the Court may, on motion of the plaintiff in the execution or process, or other party interested therein, direct a sale of the goods and chattels claimed as aforesaid, and the proceeds thereof shall be paid into Court to await the determination of the issue.

Section 13. If upon the trial of said issue the title to said goods and chattels be found not to be in the claimant, he shall pay all the costs of said proceeding, including the allowance of a fee to counsel for the plaintiff in the execution or process, as shall be fixed by the Court, and the proceeds of said goods and chattels, if in Court, shall be paid to the party entitled thereto as thus ascertained. If, however, said goods and chattels have been taken by the claimant, a verdict and judgment for the value thereof shall be entered against the claimant and in favour of the defendant in the issue.

Section 14. In all issues framed under this Act all the costs of the proceedings shall follow the judgment and be paid by the losing party as in other cases.

Section 15. If the sheriff shall comply with the provisions of this Act, he shall be free from all liability to the claimant, the plaintiff and defendant in the execution, the person found in possession of the goods and chattels levied on or seized, and every other person who had knowledge of such levy or seizure prior to the sale of said goods and chattels, or who shall take any step under the provisions of this Act.

Section 16. All Acts or parts of Acts inconsistent herewith be and the same are hereby repealed.

Public Law 33 of 1899.—Whenever a levy upon personal property shall be made on a testatum fieri facias, and a dispute arises concerning the ownership of such property, the interpleader proceedings shall be carried on in the county where the property is, and the levy has been made.

A rule to interplead must be entered in the Court out of which the process issues: *Sickles v. Kramer* (1897), 7 Pa. Dist. R. 401. The Act is not applicable to domestic attachment suits: *McCullough v. Goodhart* (1899), 8 Pa. Dist. R. 378. A rule for issues will be made absolute on the return of the sheriff's rule, with no answer by any of the parties: *Meyer v. Jeske* (1899), 8 Pa. Dist. R. 239. If a sheriff improperly postpone a sale at the instance of one only of several execution creditors he cannot have an interpleader upon the other writs: *Schofield v. Casselberry* (1879), 9 W. N. C. Pa. 95. It is the duty of a second

execution creditor to call on the first either to take issue on the claim or to relinquish the levy: *Howell v. Roberts*, 3 Leg. & Ins. Rep. Pa. 9.

Prince Edward Island.—On the 15th of April, 1867, the Island of Prince Edward adopted what is in substance the English Interpleader Act of 1831, 1 & 2 Will. IV., c. 53. The Act is 20 Vict. Prince Edward Island, c. 11, amended by 22 Vict. c. 14, and the six sections correspond to the first seven sections of the English Act, omitting the fourth section. By 55 Vict. P. E. Id., c. 24, 5th May, 1892, the Act of 1867 is extended to the County Court.

Quebec.—The Code of Civil Procedure does not contain any interpleader provisions, nor are there any reported decisions upon the subject.

Queensland adopted in 1867 (31 Vict. No. 11), what is almost a verbatim copy of the English Acts of 1831 and 1860. These provisions are sections 22 to 35 of an "Act to consolidate and amend the laws relating to Arbitration, Interpleader, Mandamus, Quo Warranto, Prohibition and Injunction," entitled "Interdict" and assented to December 28, 1867. Then in 1876 was introduced the English Judicature Act, and with it the section which allows debtors, trustees and others, to interplead in certain cases before they have been sued, as well as the Rule which says: "With respect to interpleader the procedure and practice now used under the 'Interdict Act of 1867,' shall apply to all actions and to all claims whether by a plaintiff or a defendant, and the application may be made at any time before delivering a defence or answer. See Consolidated Statutes, 1899, p. 1920, 1926. See also for interpleader in Small Debts Court (31 Vict. No. 20, s. 51), p. 1108; under District Courts Act (31 Vict. No. 20, s. 100), p. 612; and under Gold Fields Act (33 Vict. No. 11, s. 91), p. 1583.

Rhodes Island.—The equitable principles of interpleader are followed: *Manchester v. Stimson* (1853), 2 R. I. 415; *Koppinger v. O'Donnell* (1889), 16 R. I. 417. There is no statutory interpleader.

Scotland.—Multiplepoinding is the term given in Scotch law to an action which may be brought by a person possessed of money or effects which are claimed by different persons. The principle of the action is analogous to that of interpleader, namely, as expressed in Scotland, to have it found that the arrestee is liable only in once and single payment. (See Bell's Dictionary and Digest of the Laws of Scotland, 7th Ed.) The process is mentioned in an Act of Sederunt of the Scott's Court of Session, of February 1st, 1677, but was known at a much earlier date, and is dealt with in the Act of James VI., 1584, c. 3. The following British Statutes refer to the forms, jurisdiction and procedure in this action:—7 Wm. IV. and 1 Vict. (1837), c. 41, s. 9-10, and Schedule E.; 13 & 14 Vict. (1850), c. 36, s. 19, and Schedule A, No. 5; 31 & 32 Vict. (1868), c. 100, s. 30; 39 & 40 Vict. (1876), c. 70, ss. 25, 47 and Schedule A.

South Australia has statutory interpleader founded on the original English Statutes (Act No. 15, 1861; and Statute of 1862), applicable in both the Superior and inferior Courts. See as to *Holmes v. Dunsall* (1863), 2 South Australia 28; *Attorney-General*

v. Bank of South Australia (1871), 5 South Australia 6; *Williams v. Carter* (1876), 10 South Australia 135; *Attorney-General v. Swan* (1877), 11 South Australia 85; *Levine v. McBeth* (1879), 12 South Australia 191.

South Carolina.—Section 143 of the Code of Civil Procedure.

A defendant against whom an action is pending upon a contract or for specific, real or personal property, may at any time before answer upon affidavit that a person not a party to the action, and without collusion by him, makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, apply to the Court for an order to substitute such person in his place and discharge him from liability to either party, on his depositing in Court the amount of the debt, or delivering the property or its value, to such person as the Court may direct, and the Court may in its discretion make the order.

South Dakota.—The statutory provision governing interpleader, section 6087 of the Code of Civil Procedure, is the same as section 5240 of the North Dakota Code.

Tennessee.—The equitable principles of interpleader are followed by the Courts: *Pillow v. Aldridge* (1843), 4 Hump. 287; *State Insurance Co. v. Gennert* (1873), 2 Tenn. Ch. 82. There is the following provision in the Code:

Section 3497. At any time before defence made, the defendant may apply to the Court or Justice to substitute in his place any person, not already a party, who claims the money or property in suit, by filing his affidavit stating the facts on which he founds his application, showing that the right in the subject matter in controversy is in such third person that he (affiant) has no interest in the suit, and may be exposed to the claim of two or more adverse parties, denying all collusion with the person sought to be substituted, and proffering to pay the money or deliver the property into the custody of the Court. If on notice to the plaintiff and the person sought to be substituted as defendant, sufficient cause be shown, the Court may order the substitution and discharge the original defendant from liability to either party, and make such disposition pending the suit, of the fund or property in controversy as to secure the money, property, or its value to the party who shall prove to be entitled.

Texas.—In this State the Courts recognize the equitable remedy of interpleader as applicable to their system, notwithstanding a party may perhaps protect himself under the practice of intervention, by giving notice of the pendency of the suit to the other claimant: *Field v. Gautier* (1852), 8 Tex. 74; *Williams v. Wright* (1857), 20 Tex. 500; *Foy v. East Dallas Bank* (1894), 28 S. W. Rep. Tex. 137. *Stevens v. Germania* (1901), 62 S. W. 824. There is no statutory interpleader.

Utah.—The Revised Statutes of Utah, 1898, have the following sections on interpleader.

Section 2921. A defendant against whom an action to recover upon a contract, or an action of ejectment, or an action for specific personal property is pending, may at any time before answer, upon affidavit that a person not a party to the action

makes against him, and without any collusion with him, a demand upon such contract, or for such property, upon notice to such person and the adverse party, apply to the Court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in Court the amount claimed on the contract, or delivering the property or its value to such person as the Court may direct, and the Court may in its discretion make the order.

2922. The provisions of the last section shall be so far applicable to an action brought against a sheriff or other officer for the recovery of personal property taken by him under an attachment or execution, or for the value of such property so taken and sold by him, that upon exhibiting to the Court the process under which he acted, with his affidavit that the property for the recovery of which, or its proceeds, the action was brought, was taken under such process, he may have the attaching or execution creditor made a joint defendant with him, and if judgment go against them, it shall provide that the property of such creditor shall be first exhausted in satisfaction thereof.

Section 2924. Whenever conflicting claims are or may be made upon a person for or relating to personal property, or the performance of an obligation, or any portion thereof, such person may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims among themselves. The order of substitution may be made and the action of interpleader may be maintained, and the applicant or plaintiff be discharged from liability to all or any of the conflicting claimants, although their titles or claims have not a common origin, or are not identical, but are adverse to and independent of one another.

Vermont.—Bills of interpleader are resorted to and the equitable principles followed: *Holmes v. Clark* (1873), 46 Vt. 22; *French v. Robchard* (1877), 50 Vt. 43. Section 907 of the Code of 1894 provides that, the Court of Chancery in Vermont shall have the same jurisdiction as the Court of Chancery had in England, except as modified by the laws of the State. There is one special provision under which a savings bank may interplead when a deposit is the subject of claims. Section 4090, laws of 1894.

Victoria (Australia)—In this colony the English Interpleader Act of 1831 was enacted, as well as the interpleader sections of the English Act of 1860, *Carter v. Sternberg* (1884), 10 Victorian L. R. (Law) 33; while interpleader in the Justices' Court is awarded under an Act founded on the English County Court provisions relating to interpleader: *Cousens v. McGee* (1867), 4 W. W. & A. (Victoria) 29. In Equity bills of interpleader were made use of *Australian v. Brethent* (1877), 3 Victorian L. R. (Equity) 138. About 1884 the Courts of Common Law and Equity were fused, and the English Judicature Acts and Rules were adopted. Order LVII. of the Victorian Supreme Court Rules of 1884 is a re-enactment of the present English Interpleader Rules. See *Australian Mount de Piety Co. v. Ward* (1885), 11 Victorian L. R. 793. It would seem that these Rules were repealed by the Supreme Court Act of 1890, and that the only provisions retained is the section allowing interpleader to a debtor, trustee or other

person liable in respect of a debt or chose in action, 54 Vict. No. 1142, s. 63 (6). For interpleader in the Justices' Courts, see 54 Vict. No. 1106, s. 96; and under the Mines Act, 1890, 54 Vict. No. 1120, s. 282.

Virginia.—The equitable principles of interpleader were early adopted: *Beers v. Spooner* (1838), 9 Leigh. 153; *Haseltine v. Brickley* (1860), 16 Gratt. 116; *Chesapeake v. Paine* (1877), 29 Gratt. 502. The Code of 1887 has the following provisions founded upon the English Interpleader Act.

Section 2998. Upon affidavit of a defendant in any action that he claims no interest in the subject matter of the suit but that some third party has a claim thereto, and that he does not collude with such third party, but is ready to pay or dispose of the subject matter of the action as the Court may direct, the Court may make an order requiring such third party to appear and state the nature of his claim and maintain or relinquish it, and in the meantime stay the proceedings in such action. If such third party on being served with such order, shall not appear, the Court may on proof, render a judgment for him, and declare such third party to be forever barred of any claim in respect of the subject matter, either against the plaintiff or the original defendant or his personal representative. If such third party on being so served shall appear, the Court shall allow him to make himself defendant in the action, and either in said action or otherwise, cause such issue or issues to be tried as it may prescribe, and may direct which party shall be considered the plaintiff in the issues, and shall give judgment upon the verdict rendered upon such trial, or if a jury be waived by the parties interested, shall determine their claims in a summary way.

Section 2999. When property of the value of more than twenty dollars is taken under a warrant of distress, or under an execution issued by a Justice, or when property of any value is taken under an execution issued by the clerk of a Court, and any person other than the party against whom the process issued, claims such property or the proceeds or value thereof, the Circuit or County Court of the County, or the Circuit or Corporation Court of the Corporation in which the property is taken, or the Judge of such Circuit or Corporation Court in vacation upon the application of the officer, when no indemnifying bond has been given, or if one has been given, on the application of the person who claims such property and has given such suspending bond as is hereinafter mentioned, may cause to appear before such Court as well the party issuing such process as the party making such claim, and such Court may exercise, for the decision of their rights all or any of the powers and authority prescribed in the preceding section.

Section 3000. Such Court on the application of the party issuing such process, may cause to appear before it the party making such claim, and may exercise the like powers and authority. In such case as is mentioned in this or the preceding section, the Court where no bond is given for the forthcoming of the property, or if it be a Circuit or Corporation Court, the Judge thereof in vacation may, before a decision of the rights, make an order for the sale of the property, or any part thereof

on such terms as the Court or Judge may deem advisable, and for the proper application of the proceeds according to the said rights. In any case before mentioned in this chapter, the Court or Judge may make all such rules and orders and enter such judgment as to costs and all other matters as may be just and proper.

Washington.—The following is the Code provisions of 1891 with respect to interpleader.

Section 153. Any one having in his possession or under his control any property or money, or being indebted, when more than one person claims to be the owner of, entitled to, interested in or to have a lien on such property, money or indebtedness, or any part thereof, may commence an action in the Superior Court against all or any of such persons and have their rights, claims, interest or liens adjudged, determined and adjusted in such action.

Section 154. In all actions commenced under the preceding section, the plaintiff may disclaim any interest in the money, property or indebtedness, and deposit with the clerk of the Court the full amount of such money or indebtedness or other property, and he shall not be liable for any costs accruing in said action. And the clerks of the various Courts shall receive and file such complaint, and all other officers shall execute the necessary processes to carry out the purposes of this Act free from all charge to said plaintiff, and the Court in its discretion shall determine the liability for costs of the action.

Section 155. Either of the defendants may set up or show any claim or lien he may have to such property, money or indebtedness, or any part thereof, and the superior right, title or lien, whether legal or equitable, shall prevail. The Court or Judge thereof may make all necessary orders, during the pendency of said action for the preservation and protection of the rights, interests or liens of the several parties.

Western Australia has statutory provisions for interpleader founded on the English Code. See Superior Court Act, 1880, of Western Australia, No. 10, section 8 (6).

West Virginia.—Equitable principles of interpleader are followed: *Oil Run v. Gale* (1873), 6 W. Va. 525; *Heckmer v. Gilligan* (1886), 28 W. Va. 750. The legislature has adopted the following provisions founded on the English Interpleader Act, Revised Code, 1899, chapter CVII.

Section 1. A defendant in an action brought against him for the recovery of money, which he does not wish to defend, but which money is claimed by a third person, or for the recovery of the possession of personal property to which he makes no claim but which is claimed by a third person, may file his affidavit stating the facts in relation thereto, and that he does not collude with such third party, but is ready to pay the money claimed, or deliver the property to the owner thereof, as the Court may direct, the Court may thereupon make an order requiring such third party to appear and state the nature of his claim, and maintain or relinquish the same, and in the meantime stay the proceedings in such action. If such third party on being served with a copy of such order, shall not appear, the

Court may, on proof of the plaintiff's right, render judgment for him, and declare such third party to be forever barred of any claim in respect of the subject matter, either against the plaintiff or the original defendant, or his personal representative. If such third party, on being so served, shall appear, the Court shall allow him to make himself defendant in the action, and either in said action or otherwise, cause such issue or issues to be tried as it may prescribe, and may direct which party shall be considered the plaintiff in the issues; and shall give judgment upon the verdict rendered, or if a jury be waived by the parties interested, shall determine their claims in a summary way. The Court may also make such order for the disposition of the money or property which is the subject matter of the action, pending the same, as it may seem proper.

Section 5. When property of the value of more than fifty dollars is taken under a warrant of distress, or when property of any value is taken under an execution issued by the clerk of the Court, and any person other than the party against whom the process issued, claims such property or the proceeds or value thereof, the Circuit Court of the county in which the property is taken, or the Judge thereof in vacation, upon the application of the officer, where no indemnifying bond has been given, or if one has been given, on the application of the person who claims such property, and has given such suspending bond as is mentioned in the next preceding section, may cause to appear before such Court, as well the party issuing such process as the party making such claim, and such Court may exercise, for the decision of their rights, all or any of the powers and authority prescribed in the first section of this chapter.

Section 6. Such Court, on the application of the party issuing said process, may cause to appear before it the party making such claim, and may exercise the like powers and authority. In such case as is mentioned in this or the preceding section the Court, where no bond is given for the forthcoming of the property, or the Judge thereof in vacation may, before a decision of the rights of the parties, make an order for the sale of the property or any part thereof, on such terms as the Court or Judge may deem advisable, and for the proper application of the proceeds according to the said rights. In any case before mentioned in this chapter, the Court may make all such rules and orders, and enter such judgment as to costs and all other matters as may be just and proper.

Wisconsin.—In interpleader the ordinary equitable principles are followed: *Baxter v. Day* (1888), 73 Wis. 27; *Gaynor v. Blewett* (1893), 55 N. W. Rep. 169. The Revised Statutes contain the following provision:

Section 2610. A defendant against whom an action is pending upon a contract, or for specific, real or personal property, or for the conversion thereof, may at any time before answer, upon affidavit that a person not a party to the action and without collusion with him, makes against him a demand for the same debt or property, upon due notice to such person and the adverse party apply to the Court for an order to substitute such person in his place and discharge him from liability to either party, on his depositing in Court the amount of the debt, or

delivering the property or its value to such person as the Court may direct, and the Court may in its discretion make the order.

Provision is also made in section 2767 under which a garnishee may be relieved when the debt garnished is claimed by a third party; and a further provision is found in section 2723 b. It has been suggested that when an action is for trover and not replevin, it is probably not within section 2610, which provides for substituting a third person as defendant in actions upon contract or for specific, real or personal property. See *Churchill v. Welch* (1879), 47 Wis. 39.

Wyoming.—This State has adopted the Ohio Code of Civil Procedure, so that sections 2405, 2406 and 2407 of the Revised Statutes of Wyoming, 1887, providing for interpleader by defendants, and sheriffs are identical with sections 5016, 5017 and 5018 of the Ohio Code. It is proper under section 2407 in an action of replevin for property taken under an execution to substitute the execution creditor as defendant in the place of the sheriff: *France v. First National Bank of Omaha* (1888), 3 Wyo. 187.

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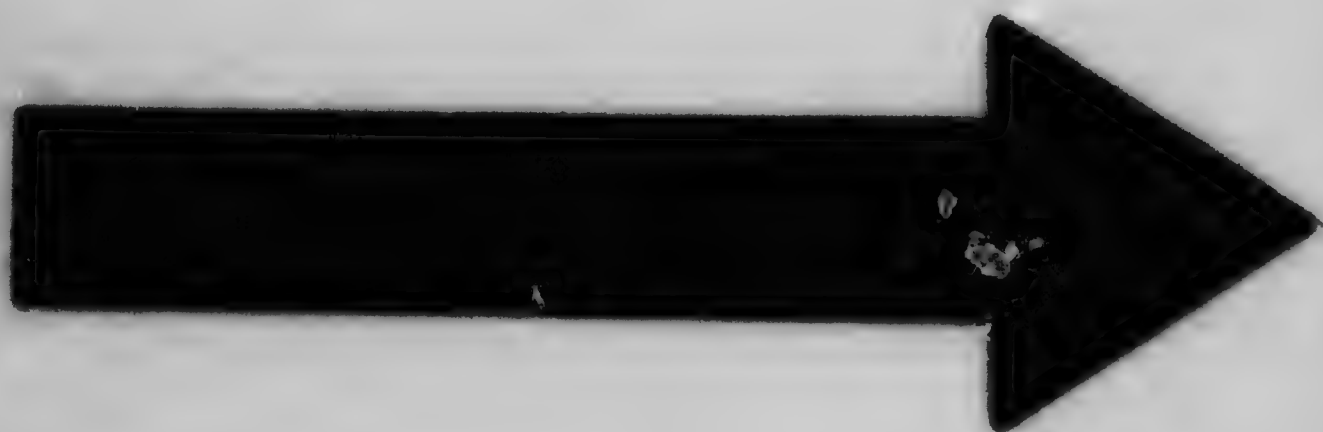
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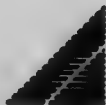
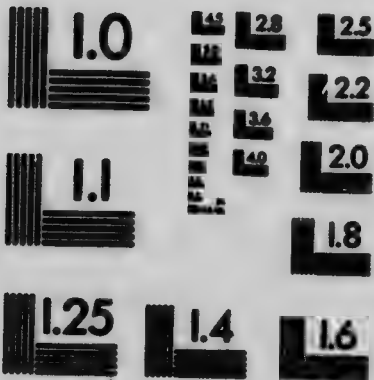
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